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	<p><i>The ARMED Services and model...</i></p> <p>DOCUMENT IDENTIFICATION</p> <p style="font-size: 1.2em;">APR 1996</p>																						
	<p><b>DISTRIBUTION STATEMENT A</b></p> <p>Approved for Public Release</p> <p>Distribution Unlimited</p>																						
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HANDLE WITH CARE

**THE ARMED SERVICES AND MODEL EMPLOYER STATUS  
FOR CHILD SUPPORT ENFORCEMENT:  
A PROPOSAL TO IMPROVE SERVICE OF PROCESS**

A Thesis

Presented to

The Judge Advocate General's School

United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

by Major Alan L. Cook

United States Army

44TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

April 1996

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by Major Alan L. Cook

ABSTRACT: On February 27, 1995, President Clinton issued Executive Order 12953, "Actions Required of all Executive Agencies to Facilitate Payment of Child Support." The Executive Order is designed to make federal agencies "Model Employers" for child support enforcement. The Order directed DoD and other federal agencies to study methods of improving service of process for child support enforcement on their employees and uniformed members, with particular emphasis on improving overseas service of process. DoD and the other federal agencies conducted reviews and submitted reports. This paper analyzes the recommendations in the reports. The analysis includes a review of military policies on assisting with service of process for child support enforcement and an overview of relevant laws. The paper proposes alternative recommendations and synthesizes them with the DoD and other agency recommendations into a unified approach. The unified approach would efficiently remove barriers to service of process on military members. DoD adoption of the unified approach would promote current military policies and place DoD in a leadership position amongst federal agencies for child support enforcement and model employer status.

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THE ARMED SERVICES AND MODEL EMPLOYER STATUS  
FOR CHILD SUPPORT ENFORCEMENT:  
A PROPOSAL TO IMPROVE SERVICE OF PROCESS

MAJOR ALAN L. COOK<sup>\*</sup>

*Any parent who is avoiding his or her child support should listen carefully: We will find you, we will catch you, we will make you pay. . . . People who bear children . . . have an absolute responsibility to take care of them. . . .*

*President William J. Clinton<sup>2</sup>*

I. Introduction

With these words, the President of the United States signaled a crackdown on federal employees, including military personnel, who dodge their child support obligations.<sup>3</sup> Prior

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<sup>2</sup> *Clinton Order Tells Agencies To Help Collect Child Support From Employees*, 33 Gov't Empl. Rel. Rep. (BNA) No. 1605, at 328 (Mar. 6, 1995).

<sup>3</sup> *Id.*



to this action, several news releases proclaimed there were more than 100,000<sup>4</sup> non-paying parents<sup>5</sup> on the federal payroll, most of whom work for the Department of Defense.<sup>6</sup> These

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<sup>4</sup> The Department of Health and Human Services (hereinafter HHS) is responsible for the figure of more than 100,000 non-paying parents on the federal payroll. The Department of Defense (hereinafter DoD) internally took exception to this number, asserting that HHS used flawed methodology to attain it. DoD estimated the actual number of DoD employees who were in arrears or not paying on their child support to be about one-third the number reported by HHS.

The author derived this information from his former position within the Office of the Under Secretary of Defense for Personnel and Readiness. One of the many responsibilities of this office includes oversight of child support enforcement matters within DoD. From the author's perspective, DoD did not openly protest the figures because it recognized that child support enforcement measures can be improved within DoD and throughout the federal government. However, it is unfortunate that HHS did not provide a more accurate figure in light of the adverse effect such numbers have on the public's perception of DoD.

Note, this is not the first time that HHS has used flawed data.

Despite nearly 20 years of performance reporting, program data remain seriously flawed because of OCSE's [Office of Child Support Enforcement within HHS] failure to establish adequate reporting standards and the states' limited reporting capabilities. The resulting lack of accurate and consistent data hinders meaningful planning, analysis, performance measurement, and management improvement. For example, an unduplicated caseload count is difficult to obtain.

UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/T-HEHS-94-209, CHILD SUPPORT ENFORCEMENT - FEDERAL EFFORTS HAVE NOT KEPT PACE WITH EXPANDING PROGRAM 5 (July 20, 1994) [hereinafter GAO REPORT] (containing the testimony of Joseph F. Delfico, Director, Income Security Issues, Health, Education, and Human Services Division before the Subcommittee on Federal Services, Post Office and Civil Service, Committee on Governmental Affairs, U.S. Senate).

<sup>5</sup> Non-paying parents are commonly referred to as "deadbeat parents."

<sup>6</sup> *Thousands of Deadbeat Parents Working for Federal Government*, SAN ANTONIO EXPRESS, Feb. 22, 1995 (WL 5545858); *Federal Employees Refuse Child Support Orders*, TULSA WORLD, Feb. 22, 1995 (WL 5610200); Jennifer Dixon, *100,000 Deadbeat Parents on U.S. Payroll*, NEW ORLEANS TIMES, Feb. 22, 1995 (WL 6053286); Jennifer Dixon, *100,000 Federal Workers Skip Child Support*, NEWS TRIBUNE (Tacoma), Feb. 22, 1995 (WL 5352964); *Cumbersome Procedures Prevent States from Collecting*, Advocate Group Says, ORANGE COUNTY REPORTER, Feb. 22, 1995, (WL 5832518); Jennifer Dixon, *Government Under Fire After Study Reveals Deadbeat Parents on U.S. Payroll*, BUFFALO NEWS, Feb. 22, 1995 (WL 5446168); *Government Employs Deadbeat Parents*, GREENSBORO NEWS &

numbers were potentially embarrassing to President Clinton. The President had promised tougher child support enforcement during his campaign, made it a central part of his welfare reform plan, and discussed it during his first State of the Union address.<sup>7</sup> To avoid embarrassment, the President had little choice but to respond swiftly.<sup>8</sup>

The President answered by issuing Executive Order 12953, "Actions Required of all Executive Agencies To Facilitate Payment of Child Support."<sup>9</sup> The goal of the Order is to make federal agencies "model employers" for child support enforcement.<sup>10</sup> To become a model employer, the Order

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RECORD, Feb. 22, 1995 (WL 2589825); *Federal Workers Targeted 100,000 Don't Support Their Kids*, PATRIOT LEDGER (Quincy), Feb. 22, 1995 (WL 8180122); Jennifer Dixon, *Many Federal Workers Dodging Child Support*, PLAIN DEALER (Cleveland), Feb. 22, 1995 (WL 7083584). All articles available in Westlaw, Westlaw Library, ALLNEWS File.

<sup>7</sup> See *id.*

<sup>8</sup> *Child Support Enforcement: Statement by Congresswoman Marge Roukema*, GOV'T PRESS RELEASE, FED. DOC'T CLEARING HOUSE, Feb. 27, 1995, available in Westlaw, Westlaw Library, GOVRP File (WL 1424625).

It is outrageous that the federal government has allowed so many deadbeat parents to get away with such an immoral and irresponsible crime for so long . . . Children who don't receive their support payments are already being treated like second-class citizens by their own parents. It's about time the government stop turning them into third-class citizens by facilitating deadbeats in avoiding their legal and moral obligation to support their children.

*Id.*

<sup>9</sup> Exec. Order No. 12,953, 60 Fed. Reg. 11,013 (1995) [hereinafter Exec. Order No. 12,953].

<sup>10</sup> *Id.* § 101.

"Child Support Enforcement" means any administrative or judicial action by a court or administrative entity of a State necessary to establish paternity or

identified immediate actions required of all federal agencies.<sup>11</sup> The Order also tasked the Department of Defense (DoD), as well as the Office of Personnel Management (OPM) and the Department of Health and Human Services (HHS) (hereinafter "other federal agencies"), to review,<sup>12</sup> study,<sup>13</sup> and provide recommendations<sup>14</sup> on issues related to child support enforcement, thereby placing these agencies in a lead role for "enhanc[ing] the Federal Government's commitment to ensuring parental support for all children."<sup>15</sup>

The President included service of legal process<sup>16</sup> as one of the issues for review by DoD,<sup>17</sup> and other federal agencies.<sup>18</sup> Service of process is one of the cornerstones upon which child support enforcement actions rest. Without proper service and notice to defendants, courts lack jurisdiction to

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establish a child support order, including a medical support order, and any actions necessary to enforce a child support or medical support order. Child Support actions may be brought under the civil or criminal laws of a State and are not limited to actions brought on behalf of the State or individual by State agencies providing services under title IV-D of the Social Security Act, 42 U.S.C. 651 *et seq.*

*Id.* § 203.

<sup>11</sup> *Id.* §§ 301-305. See *infra* part III.B.2.a.

"Federal agency" means any authority as defined at 5 U.S.C. 105, including the Uniformed Services, as defined in section 202 of this order." *Id.* § 201.

<sup>12</sup> *Id.* § 401(a).

<sup>13</sup> *Id.* § 402(a).

<sup>14</sup> *Id.* §§ 401(b), 402(b).

<sup>15</sup> *Id.*

<sup>16</sup> For the remainder of this paper, the term "service of legal process" will be shortened to "service of process."

<sup>17</sup> Exec. Order No. 12,953, *supra* note 8, § 401(a).

<sup>18</sup> *Id.* § 402(a)(iv).

issue support orders for child support.<sup>19</sup> Without a court order, many parents refuse to pay financial support for their children who do not live with them.

Even when courts have jurisdiction over a defendant, there may be laws or policies that affect methods of service of process. Within the United States, military policies on providing assistance vary depending on the type of federal jurisdiction<sup>20</sup> where an installation is located and restrictions imposed by the Posse Comitatus Act.<sup>21</sup> Also, the individual military services have different policies on how much assistance they give to parties seeking to serve process.<sup>22</sup> Outside the United States, the internal laws of host nations<sup>23</sup> or international treaties<sup>24</sup> limit military assistance with service of process. These laws and policies increase costs and prolong the time necessary to resolve support obligations, thereby creating barriers to effective child support enforcement.

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<sup>19</sup> See *Griffin v. Griffin*, 328 U.S. 876 (1946).

<sup>20</sup> For example, look at the difference in assistance provided in areas of exclusive federal jurisdiction versus concurrent federal jurisdiction. See discussion *infra* part IV.B.1.

<sup>21</sup> 18 U.S.C. 1385 (1994). See *infra* part IV.C. for a discussion of the Posse Comitatus Act.

<sup>22</sup> See discussion *infra* part III.B.1. for an example of how the Air Force policy differs from other military services regarding assistance in areas of exclusive federal jurisdiction.

<sup>23</sup> See discussion *infra* parts V.B.2.c. and V.C.

<sup>24</sup> The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 [hereinafter Hague Service Convention] (entered into force for the United States Feb. 10, 1969).

Prior to the President's Executive Order, Congress examined child support enforcement issues and proposed legislation attacking obstacles to support, including service of process.<sup>25</sup> Congress included in its proposals language requiring federal agencies to designate agents for receipt of service of process on employees or military members<sup>26</sup> stationed overseas.<sup>27</sup> This approach benefits plaintiffs by providing a central location within each federal agency for service of process. It also reduces the costs and delays associated with service overseas and eliminates requirements for serving process under the internal laws of foreign nations and international treaties. To date, Congress has not passed legislation mandating that federal agencies appoint designated

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<sup>25</sup> See, e.g., H.R. 1600, 103th Cong., 1st Sess. (1993); H.R. 1961, 103th Cong., 1st Sess. (1993); H.R. 2790, 103th Cong., 1st Sess. (1993); H.R. 4570, 103th Cong., 2d Sess. (1994); H.R. 4605, 103th Cong., 2d Sess. (1994); S. 689, 103th Cong., 1st Sess. (1994); S. 2224, 103rd Cong., 2d Sess. (1994); H.R. 4, 104th Cong., 1st Sess. (1995); H.R. 195, 104th Cong., 1st Sess. (1995); H.R. 785, 104 Cong., 1st Sess. (1995).

<sup>26</sup> Within DoD, it is more common to refer to members of the Armed Forces as "service members." However, in light of the fact that this paper routinely uses the word "service" in conjunction with "of process," the paper will instead refer to members of the Armed Forces as military members, unless a member is referred to by a common military service designation (e.g., "soldier" for Army; "sailor" for Navy; "airman" for Air Force; and "marine" for Marines).

<sup>27</sup> See, e.g., H.R. 4570, 103th Cong., 2d Sess., § 201(a) (1996). This section provides that:

[T]he head of each Government agency shall . . . designate an agent for receipt of service of process, for any Federal employee or member of the Armed Forces serving in or under such agency, in connection with an action, brought in a court of competent jurisdiction within any state, territory, or possession of the United States, for obtaining a child support order or for establishing parentage.

*Id.*

agents for receipt of service of process in actions to establish child support or paternity.

The Executive branch also considered including language within Executive Order 12953 to direct federal agencies to designate agents for receipt of service of process that would have the same effect and bind employees to the same extent as actual service upon the them.<sup>28</sup> OMB, after consultation with DoD about the propriety of designated agents,<sup>29</sup> amended the draft of Executive Order 12953 before the President signed it. The change removed the requirement for federal agencies to designate an agent for receipt of service of process.<sup>30</sup> In its place, OMB inserted language directing federal agencies to appoint responsible officials to facilitate service of process.<sup>31</sup> The President adopted the amended language in the

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<sup>28</sup> The author reviewed proposed drafts containing language that would have required federal agencies to designate agents for receipt of service of process for child support enforcement purposes. *See supra* note 3.

<sup>29</sup> The author, at the direction of his superiors, coordinated the change with representatives of the Office of Management and Budget [hereinafter OMB]. *See* Exec. Order No. 12,953, *supra* note 8, § 302

Every Federal agency shall assist in the service of legal process in civil actions pursuant to orders of courts of States to establish paternity and establish or enforce a support obligation by making Federal employees and members of the Uniformed Services stationed outside the United States available for the service of process. Each agency shall designate an official who shall be responsible for facilitating a Federal employees' or member's availability for service of process, regardless of the location of the employee's workplace or member's duty station.

*Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

Executive Order, but directed further study of the designated agent approach.<sup>32</sup>

The designated agent approach offers appealing benefits to child support enforcement agencies, their caseworkers, and custodial parents confronted with the hurdles of serving process on DoD employees and military members stationed overseas.<sup>33</sup> However, for policy makers and lawyers, there is a genuine concern that the proposal will prejudice due process rights and unwittingly affect compliance with international law obligations.

It is time to get to the heart of the matter and determine whether procedural hurdles associated with due process rights, judicial jurisdiction, and international law are keeping DoD from becoming a model employer. Accordingly, this paper examines current DoD policies related to child support enforcement and service of process, as well as recommendations to improve them. The results of this examination include a proposed unified approach for improving service of process on military members within DoD.<sup>34</sup> The purpose of the unified approach is to enhance DoD's commitment to child support enforcement by placing the Armed Forces in

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<sup>32</sup> See Exec. Order No. 12,953, *supra* note 8, § 401(a), § 402(a)(iv).

<sup>33</sup> See discussion *infra* part V.B.1.b.

<sup>34</sup> The parameters of this paper do not permit scrutinizing other issues that could improve child support enforcement (e.g., tightened wage withholding procedures, improved locator services, better access to health care, etc.).

the forefront of other federal agencies for becoming a model employer. This goal is consistent with the past proactive practices of the Armed Forces to promote child support enforcement.<sup>35</sup>

The body of this paper contains six parts. Part One defines the scope of the child support enforcement problem. Part Two discusses Executive Order 12953 in detail, focusing on the tasks federal agencies must perform in order to achieve model employer status. Part Three overviews military service policies on child support. This section addresses military assistance with service of process both within and outside the United States, including a discussion of how the Posse Comitatus Act<sup>36</sup> limits military assistance. Part Four surveys other laws and procedures related to service of process. This encompasses a review of jurisdictional prerequisites necessary for valid service of process, as well as foreign laws and international agreements that affect service overseas. A fundamental understanding of these rules is critical before proceeding to Part Five that analyzes DoD's response to the Executive Order. Finally, Part Six proposes a unified approach to improving service of process for child support enforcement. It includes recommendations for federal agency

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<sup>35</sup> For example, the Armed Forces, specifically the Army, criminalized failure to provide for support years before the Congress enacted any similar type of legislation (for example, 18 U.S.C. § 228 (1994) makes non-support a criminal offense in certain interstate types of cases).

<sup>36</sup> 18 U.S.C. § 1385 (1994).



actions and changes in law that would improve service of process in child support enforcement cases.

## II. Part One: Scope of the Problem

### A. Nationwide

During the 1970s, Congress found that nonpayment of child support contributed to childhood poverty and increased the number of families receiving government support.<sup>37</sup> Based on these findings, Congress created a federal child support enforcement program.<sup>38</sup> Congress designed the program to strengthen state and local efforts to obtain child support from noncustodial parents who failed to provide financial support.<sup>39</sup> Congress later amended this program to apply to all families, not just those participating in federally funded programs.<sup>40</sup> By extending assistance with obtaining financial

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<sup>37</sup> GAO REPORT, *supra* note 3, at 1 ("Nonpayment of child support contributes to childhood poverty, as well as to increases in the number of families receiving Aid to Families of Dependent Children (AFDC) benefits.").

<sup>38</sup> *Id.* ("To help families avoid poverty and welfare dependency, the Congress created the CSE [child support enforcement] program in 1975 as a federal-state partnership.").

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 2.

The 1984 child support amendments required state and local programs to equally serve AFDC and non-AFDC families who apply for services and greatly enhanced the available enforcement tools. Four years later, the Family Support Act of 1988 set standards for paternity establishment and timeliness of services, and added requirements to ensure the fairness and currency of support awards.

support to all families, Congress intended to help those families not requiring federal or state aid to stay off the welfare rolls.<sup>41</sup>

By 1994, there were 15 million support cases nationwide and approximately \$34 billion in unpaid child support.<sup>42</sup> Only about twenty percent of children and families relying on government assistance programs receive full or partial child support from their noncustodial parent.<sup>43</sup> In those cases where there is a child support enforcement order, the nationwide default rate is nearly fifty percent.<sup>44</sup> This is an incredible statistic when one considers that the default rate on used car loans is three percent.<sup>45</sup>

*B. Within DoD*

In addition to the adverse press releases on the alleged number of deadbeat parents employed by DoD, a formal study by HHS found 42,000 military personnel<sup>46</sup> in arrears on child support payments in 1989.<sup>47</sup> Based on a sampling of military

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*Id.*

<sup>41</sup> *Id.*

<sup>42</sup> 141 CONG. REC. S5404-02, S5414 (daily ed. Apr. 6, 1995) (statement of Mr. Pryor introducing S.687)[hereinafter Pryor Statement].

<sup>43</sup> GAO REPORT, *supra* note 3.

<sup>44</sup> See Pryor Statement, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> In light of the draw-down of military personnel that has reduced the active duty population in half, one would assume that this number should be substantially reduced.

<sup>47</sup> OFFICE OF THE INSPECTOR GENERAL, DEP'T. OF HEALTH AND HUMAN SERVICES, OEI-07-90-02250, CHILD SUPPORT AND THE MILITARY 1 (1993).

cases, the study estimated that states do not collect child support payments in more than half of the military cases sampled.<sup>48</sup> Out of those cases, about twenty-five percent had court orders for support that military members had failed to honor.<sup>49</sup> There were no court orders in the remaining seventy-five percent of cases.<sup>50</sup> The three most common reasons cited in the report that contributed to the lack of a court order were: (1) failure to locate the member due to lack of a social security number;<sup>51</sup> (2) failure by the child support enforcement caseworker to make appropriate contacts even though the member had been located;<sup>52</sup> and (3) failure to collect based on the member's assignment overseas or on a ship.<sup>53</sup> The report projected that finding these parents and enforcing or establishing court orders would save the federal government more than \$54.1 million annually.<sup>54</sup>

### C. Comparison of National Problem with Military Problem

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<sup>48</sup> *Id.* at 3 (51%).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 4. Without a social security number, it is difficult to locate a military member; unless the requesting party knows the member's unit of assignment, current address, or other personal identifiers, such as date and place of birth). *See generally id.* at 6.

<sup>52</sup> *Id.* at 4. The report noted that child support enforcement (hereinafter CSE) caseworkers have a difficult job in terms of keeping abreast on all appropriate contacts. Not only are they responsible for locating persons within their own area, but also in all other states and, perhaps, in foreign countries. One of the recommendations made in the report was better training of CSE caseworkers. *See id.* at 6, 7.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1.

The military default rate in cases involving support orders is one-half that of the nationwide default rate in similar cases. The military success in this area is probably due to the fact that military society is much more disciplined than the civilian community. There are rules governing a military member's conduct,<sup>55</sup> including requirements to pay just debts or face criminal prosecution.<sup>56</sup> These rules virtually guarantee that service members will comply with child support orders, unless they are willing to face adverse administrative<sup>57</sup> or criminal actions.<sup>58</sup> This unique combination of authority, that permits an employer (the military services) to take adverse administrative and criminal sanctions against its own employees (military members), makes enforcement of child support orders far less problematic within the military community as compared to the civilian community.<sup>59</sup>

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<sup>55</sup> See UCMJ art. 133 (1995 ed.) (making it a criminal offense for military officers to engage in conduct unbecoming an officer and a gentleman; article does not apply to enlisted personnel).

<sup>56</sup> UCMJ art. 134 (1995 ed.) (making it a criminal offense for any military member to dishonorably fail to pay a just debt that has become due and payable provided the accused's actions were to the prejudice of the armed forces or was of a nature to bring discredit upon the armed forces).

<sup>57</sup> See e.g., DEP'T OF ARMY, REG. 600-37, PERSONNEL-GENERAL: UNFAVORABLE INFORMATION, para. 3-4 (19 Dec. 1986) (explaining the filing of "nonpunitive administrative letters of reprimand, admonition, or censure in official personnel files"); DEP'T OF ARMY, REG. 635-200, ENLISTED SEPARATIONS (1995).

<sup>58</sup> See *supra* notes 54, 55.

<sup>59</sup> When there is a problem with enforcement, it often stems from the fact that no one has requested the commander's assistance and, therefore, the commander is not involved with crafting a solution. Those dealing with the military must recognize the importance of using command intervention when necessary.

Despite the military's stronger record in child support enforcement, the public often perceives exactly the opposite and believes that service of process is the problem.<sup>60</sup> In large part, this is due to the great number of military members assigned overseas and on ships, or deployed for war or other national emergencies. Thus, it is the basic nature of military service that creates a tension between society's need for improved child support enforcement and its need for national defense. The following scenario highlights this tension.

*Scenario:* Assume a military member is the subject of a pending legal action for child support. Prior to service of process, the member is deployed for war. The member admitted to paternity, but has publicly proclaimed that he will not support the child because he told the destitute mother to have an abortion. The member spends two years in battle. During this time, the state child support enforcement agency is unable to serve process. Is it fair that the mother and child did not receive support for two years and that the State and taxpayers had to support the child?

It is arguable whether government policy should allow service of process under the above scenario. One can argue it is fair to serve process because the Soldiers' and Sailors' Civil Relief Act (SSCRA)<sup>61</sup> protects military members.

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<sup>60</sup> See generally *supra* note 24 (listing proposed legislation).

<sup>61</sup> Soldier's and Sailor's Civil Relief Act (SSCRA), 50 U.S.C. app. §§ 501-599 (1988, as amended in 1991).

The protections offered by the SSCRA include stays in court proceedings<sup>62</sup> and reopening of default judgments.<sup>63</sup> The contrary argument is that it is unfair to distract the service member and his or her unit from war-fighting in order to respond and comply with legal mandates. This latter argument generally reflects the current practice.<sup>64</sup>

While the above scenario identifies competing interests, it is more useful for emphasizing that the military services should do their best to accommodate matters involving child support enforcement during windows of opportunity when a member is reasonably available for service of process. This accords with military service policies that prohibit military members from using their status as a member of the Armed Forces to shield themselves from providing financial support to their dependents.<sup>65</sup> Without changes to enhance service of process on military members, child support enforcement agencies, practitioners, policy makers, and the American public will continue to focus their frustrations with child support enforcement on the military establishment that, in their opinion, has made service of process unduly difficult.

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<sup>62</sup> SSCRA, 50 U.S.C. app. § 521 (1988) ("Stay of proceedings where military service affects conduct thereof" - the standard is whether the defendant has been materially affected by reason of his or her military service)

<sup>63</sup> SSCRA, 50 U.S.C. app. § 520 (1988) ("Default judgments" - to open a default judgment, the standard is whether the defendant has been prejudiced by military service and it appears that there is a meritorious or legal defense).

<sup>64</sup> Unless there are process servers so bold as to apply their trade on the battlefield.

<sup>65</sup> See discussion *infra* part IV.A.

### III. Part Two: President's Executive Order

#### A. Background

In 1992, the Democratic Party Platform included a promise to create an effective system of child support enforcement nationwide.<sup>66</sup> Following the election, which resulted in a Democratically controlled Executive Branch and Congress, Congress put forth legislative initiatives designed to improve the Nation's welfare system and enhance child support enforcement procedures.<sup>67</sup> Before legislation could be passed in these areas, another major political shift occurred with the election of both a Republican Senate and House of Representatives, thereby splitting political power between the President and the Congress. Democratic party initiatives came to a standstill as the new Republican majority promoted their "Contract with America."<sup>68</sup> The President had little choice but to use his authority to fulfill his campaign promises regarding the creation of a more effective system for child support enforcement.

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<sup>66</sup> 1992 Democratic Party Platform: *A New Covenant with the American People*, DSA Home Page, DSA's 12-Point Program, A Moderate Democratic Platform, <http://ccme-mac4.bsd.uchicago.edu/DSADems/DP92>.

<sup>67</sup> See *supra* note 25.

<sup>68</sup> See "Contract with America": House GOP Offers Descriptions Of Bills To Enact "Contract," 52 CONG.Q. WKLY REP. 45, Nov. 19, 1994, available in Westlaw, Westlaw Library, ALLNEWS CONGQTR File.

## B. The Order

1. *Findings*--On February 21, 1995, President Clinton issued Executive Order 12953.<sup>69</sup> In the order, President Clinton found that "[c]hildren need and deserve the emotional and financial support of both their parents."<sup>70</sup> The President also found that the federal government, as "the Nation's largest single employer . . . should set an example of leadership and encouragement in ensuring that all children are properly supported."<sup>71</sup>

2. *Model Employer Status*--Based on these findings, the President used the Executive Order to "[e]stablish the executive branch of the Federal Government, through its civilian employees and Uniformed Services members, as a model employer in promoting and facilitating the establishment and enforcement of child support."<sup>72</sup> Under the Executive Order, federal agencies must cooperate with efforts to establish paternity,<sup>73</sup> obtain child support orders,<sup>74</sup> and enforce

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<sup>69</sup> Exec. Order No. 12,953, *supra* note 8.

<sup>70</sup> *Id.* preamble.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> GAO REPORT, *supra* note 3, at 2.

Paternity establishment is the identification of a child's legal father. Paternity is established in one of two ways: (1) through a voluntary acknowledgment by the father or (2) if the case is contested, through a determination based on scientific and testimonial evidence.

*Id.* n.2.



collection of child support.<sup>75</sup> It also commands federal agencies to provide information to their employees about actions they should take and services that are available to ensure their children receive the support to which they are legally entitled.<sup>76</sup>

a. *First Step: Immediate Actions*--As a first step to achieving model employer status, the Executive Order required an array of immediate actions by federal agencies.<sup>77</sup> For instance, the Order mandated that federal agencies: (1) review and ensure compliance with wage withholding statutes related to child support;<sup>78</sup> (2) assist with service of legal process overseas by making employees and members of the Uniformed Services<sup>79</sup> available for service of process, and designate a responsible official for such assistance;<sup>80</sup> (3) cooperate with the Federal Parent Locator Service (FPLS);<sup>81</sup> (4) implement crossmatching of federal income tax refund offset records based on child support with federal agency payroll and personnel records to determine if there are federal employees

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<sup>74</sup> *Id.* (providing that "[a] support order establishes the legal obligation of the noncustodial parent to pay child support.").

<sup>75</sup> Exec. Order No. 12,953, *supra* note 8, § 101(b).

<sup>76</sup> *Id.* § 101(c).

<sup>77</sup> *Id.* §§ 301-306.

<sup>78</sup> *Id.* § 301.

<sup>79</sup> *See id.* at § 202. "'Uniformed Services' means the Army, Navy, Marine Corps, Air Force, Coast Guard, and the Commissioned Corps of the National Oceanic and Atmospheric Administration, and the Public Health Service." *Id.*

<sup>80</sup> *Id.* § 302.

<sup>81</sup> *Id.* § 303.

with child support delinquencies;<sup>82</sup> and (5) provide information to prospective and current employees on available child support enforcement services.<sup>83</sup> The order assured responsive federal agency action by requiring agency activity reports within 90 days of issuance of the Executive Order.<sup>84</sup>

b. *Second Step: Agency Reviews and Reports*--As a second step to ensuring model employer status for federal agencies, the Order decreed additional agency action.<sup>85</sup> The Order commanded the Secretary of Defense (SECDEF) to chair a task force for conducting a full review of policies and practices within the Uniformed Services. Guidance in the Executive Order required the task force to ensure that

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<sup>82</sup> *Id.* § 304.

<sup>83</sup> *Id.* § 305 (Title IV-D of the Social Security Act is found at 42 U.S.C. §§ 651-666 (1994)).

In 1974, Congress established a mandatory program for the states for the enforcement of family support by the enactment of Title IV-D of the Social Security Act, and has amended it since that time, most notably in 1984 and 1988, to expand both the coverage of the program (to all families, not just those receiving welfare assistance) and the procedures the states are required to use. The federal program and the accompanying regulations require the states to enforce existing orders, to obtain support orders where necessary, to establish paternity, and to cooperate with the child support enforcement offices in other states. They must utilize interstate procedures when necessary to obtain support, including reciprocal arrangements with other countries . . . . [As an aside,] [i]n 1992 Congress also enacted a statute making failure to provide child support a federal crime in some inter-state cases. 18 U.S.C. § 228 (Supp. IV 1992).

Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L. Q. 90, 105 (1994).

<sup>84</sup> Exec. Order No. 12,953, *supra* note 8, § 306

<sup>85</sup> *Id.* part 4.

Uniformed Services personnel provide their children with financial and medical support in the same manner and within the same time frames as mandated for all other children.<sup>86</sup> At a minimum, the Order required the task force to review issues related to: (1) withholding non-custodial parents' wages; (2) service of legal process; (3) activities to locate parents and their income and assets; (4) release time to attend civil paternity and support proceedings; and (5) health insurance coverage under the Civilian Health and Medical Program of the Uniformed Services.<sup>87</sup> The Executive Order<sup>88</sup> also directed that the DoD task force review the SSCRA,<sup>89</sup> the Uniformed Services Former Spouses Protection Act,<sup>90</sup> and the Tax Equity and Fiscal Responsibility Act of 1982.<sup>91</sup> The Executive Order did not require DoD to take any action that would compromise the defense or national security interests of the United States.<sup>92</sup>

In addition to the DoD task force, the Order established a second working group formed jointly by OPM and HHS.<sup>93</sup> The

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<sup>86</sup> *Id.* § 401(a).

<sup>87</sup> *Id.* Note, the Civilian Health and Medical Program of the Uniformed Services is more commonly known as CHAMPUS.

<sup>88</sup> *Id.*

<sup>89</sup> SSCRA, 50 U.S.C. app. §§ 501-591 (1988, as amended in 1991).

<sup>90</sup> Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1994).

<sup>91</sup> Pub. L. 102-581, 106 Stat. 4875-4883, 4895 (1992)

<sup>92</sup> Exec. Order No. 12,953, *supra* note 8, § 503. Other caveats provided that Executive Order is only intended to "require Federal agencies to adhere to the same standards as are applicable to all other employers in the Nation and shall not be interpreted as subjecting the Federal Government to any State law or requirement." *Id.* § 502. Also, the order stated that it is internal to the management of the executive branch and does create any right or benefit enforceable at law against the United States. *Id.* § 501.

<sup>93</sup> *Id.* § 402(a).

Order required the OPM and HHS working group (hereinafter "other federal agency working group") to consider issues similar to those under review by the DoD task force.<sup>94</sup> The

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<sup>94</sup> *Id.*

**Sec. 402. Additional Federal Agency Actions.** (a) OPM and HHS shall jointly study and prepare recommendations concerning additional administrative, regulatory, and legislative improvements in the policies and procedures of Federal agencies affecting child support enforcement. Other agencies shall be included in the development of recommendations for specific items as appropriate. The recommendations shall address, among other things:

(i) any changes that would be needed to ensure that Federal employees comply with child support orders that require them to provide health insurance coverage for their children;

(ii) changes needed to ensure that more accurate and up-to-date data about civilian and uniformed personnel who are being sought in conjunction with State paternity or child support actions can be obtained from Federal agencies and their payroll and personnel records, to improve efforts to locate noncustodial parents and their income and assets;

(iii) changes needed for selecting Federal agencies to test and evaluate new approaches to the establishment and enforcement of child support obligations;

(iv) proposals to improve service of process for civilian employees and members of the Uniformed Services stationed outside the United States, including the possibility of serving process by certified mail in establishment and enforcement cases or of designating an agent for service of process that would have the same effect and bind employees to the same extent as actual service upon the employees;

(v) strategies to facilitate compliance with Federal and State child support requirements by quasi-governmental agencies, advisory groups, and commissions; and

(vi) analysis of whether compliance with support orders should be a factor used in defining suitability for Federal employment.

*Id. Compare with id. at § 401(a):*

Order directed that the reviews by the DoD task force and the other federal agency working group culminate with recommendations to OMB for "additional administrative, regulatory, and legislative improvements in the policies and procedures of Federal agencies affecting child support enforcement."<sup>95</sup>

#### IV. Part Three: DoD Policies Regarding Child Support Enforcement

The military services have an interest in the welfare of both military members and their families.<sup>96</sup> They recognize

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**Sec. 401. Additional Review for the Uniformed Services.** (a). In addition to the requirements outlined above, the Secretary of the Department of Defense (DoD) will chair a task force, with participation by the Department of Health and Human Services (HHS), the Department of Commerce, and the Department of Transportation, that shall conduct a full review of current policies and practices within the Uniformed Services to ensure that children of Uniformed Services personnel are provided financial and medical support in the same manner and within the same time frames as is mandated for all other children due such support. This review shall include, but not be limited to, issues related to withholding non-custodial parents' wages, service of process, activities to locate parents and their income and assets, release time to attend civil paternity and support proceedings, and health insurance coverage under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS). All relevant existing statutes, including the Soldiers' and Sailors' Civil Relief Act of 1940, the Uniformed Services Former Spouses Protection Act, and the Tax Equity and Fiscal Responsibility Act of 1982, shall be reviewed and appropriate legislative modifications shall be identified.

*Id.*

<sup>95</sup> See Exec. Order No. 12,953, *supra* note 8, §§ 401(b), 402(b) (providing for submission of the recommendations to OMB within 180 days of issuance of the Executive Order).

<sup>96</sup> See e.g., DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, para. 1-5a(1)-(6) (5 Dec. 1994) [hereinafter AR 608-99] (referencing numerous

that military duty often requires military members and their families to reside outside their state of domicile, to include living overseas.<sup>97</sup> In some cases, a military member's assignment may place them beyond the judicial process of state courts.<sup>98</sup> This part discusses how DoD addresses these concerns and explains military service policies on providing assistance with service of process.

#### A. General Policy

DoD policy requires that military personnel provide adequate support to their children.<sup>99</sup> However, there is no DoD central guidance on how to ensure such support.<sup>100</sup> Instead, DoD left the mechanics to the individual military services.

Military service policies prohibit the use of a military member's assignment to deny financial support to their family members or to evade court orders on financial support,

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programs established pursuant to laws that govern family housing; living and travel allowances; medical care; legal services; child care and youth development services; child and spouse abuse prevention services; and morale, welfare, and recreation services).

<sup>97</sup> *Id.* para. 1-5b.

<sup>98</sup> *Id.*

<sup>99</sup> See *Child Support Responsibility Act of 1994: Hearings Before the Subcommittee on Military Forces and Personnel of the House Committee on Armed Services*, H.R. 4570, 104th Cong., 1st Sess. (1994) (testimony of Jeanne B. Fite, Deputy Under Secretary of Defense for Requirements and Resources).

<sup>100</sup> DoD has provided central guidance in related areas concerning families. See DEP'T OF DEFENSE DIR. 6400.1, FAMILY ADVOCACY PROGRAM (23 June 1992); DEP'T OF DEFENSE DIR. 6400.2, CHILD AND SPOUSE ABUSE REPORT (10 July 1987). However, the foregoing DoD guidance does not address cooperation with judicial actions to establish paternity or support.

paternity, and other related matters.<sup>101</sup> These policies place primary responsibility on the service member for providing adequate financial support to their family members.<sup>102</sup> The policies carry the threat of adverse administrative action<sup>103</sup> if a service member fails to comply with them.<sup>104</sup> Also, one of the military services makes the failure to provide child support a criminal offense.<sup>105</sup>

Military service policies proactively support compliance with family support obligations. However, they generally

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<sup>101</sup> AR 608-99, *supra* note 95, para. 1-5c.

<sup>102</sup> *See, e.g.*, AR 608-99, *supra* note 95, para. 1-5d. This paragraph provides that:

Soldiers are required to manage their personal affairs in a manner that does not bring discredit upon themselves or the United States Army. This responsibility includes--

- (1) Maintaining reasonable contact with family members so that their financial needs and welfare do not become official matters of concern for the Army.
- (2) Conducting themselves in an honorable manner with regard to parental commitments and responsibilities.
- (3) Providing adequate financial support to their family members.
- (4) Complying with all court orders.

*Id.*

<sup>103</sup> For example, the adverse administrative action could include a memorandum of reprimand, bar to reenlistment, or an administrative separation. Without a detailed explanation, these actions can jeopardize or end a service member's military career.

<sup>104</sup> DEP'T OF DEFENSE REPORT, EXECUTIVE ORDER 12,953, SECTION 401 "ADDITIONAL REVIEW FOR THE UNIFORMED SERVICES" 3, part III.A.2. (25 Aug. 1995) [hereinafter DOD REPORT] (submitted by letter from The Honorable Edwin Dorn, Under Secretary of Defense for Personnel and Readiness, to the Honorable Alice M. Rivlin, Director, Office of Management and Budget).

<sup>105</sup> AR 608-99, *supra* note 95, para. 2-5 (This Army regulation makes it a criminal offense for military members to fail to provide financial support pursuant to a court order, a written financial support agreement in the absence of a court order, or a regulatory financial support requirement in the absence of a court order or a financial support agreement).

1. *Within the United States*--When a party wants to serve state court process on an area under military control, the amount of military assistance depends on the type of federal jurisdiction<sup>111</sup> applicable to that area. In areas of exclusive

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<sup>111</sup> See DEP'T OF ARMY, PAMPHLET 27-21, LEGAL SERVICE, ADMINISTRATIVE AND CIVIL LAW HANDBOOK, 16, 17 (15 Mar. 1992). "Federal jurisdiction" in this context refers to the authority to legislate within a geographically defined area. When the United States exercises Federal jurisdiction over particular land, it can enact general, municipal legislation applying within that land. There are four types of jurisdiction:

- (1) *Exclusive legislative jurisdiction*. "Exclusive legislative jurisdiction" arises where the Government has received all the authority of the State to legislate with no reservation by the State of any authority except the right to serve civil and criminal process [As to any kind of land, the Supreme Court has held: "There is nothing incompatible with the exclusive sovereignty or jurisdiction of one state that it should permit another State to execute its process within its limits." *United States v. Cornell*, 2 Mass. 60, cited in *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525, 534 (1885). . . . [I]t should be sought only when State or local laws interfere with military operations.
- (2) *Concurrent legislative jurisdiction*. "Concurrent legislative jurisdiction" arises where, in granting to the United States authority that would otherwise amount to exclusive legislative jurisdiction over an area, a State reserves the right to exercise authority concurrently with the United States. . . . [I]t may be justified for installations of great size, with a large population, in a remote location or, where, because of peculiar requirements stemming from Army use, the State or local Government does not have the resources to administer the area.
- (3) *Partial legislative jurisdiction*. "Partial legislative jurisdiction" arises where the Federal Government has been granted some legislative authority over an area by a State which reserves to itself the right to exercise, alone or concurrently with the United States, other authority constituting more than the right to serve civil or criminal process in the area. In other words, either the Federal Government, or the State, or both, have some legislative authority. An example would be where a State reserves only jurisdiction over criminal offenses, allowing the United States to exercise all other sovereign rights concurrently with the State, but denying it legislative jurisdiction over crimes.
- (4) *Proprietorial interests*. The term "proprietary interest" describes situations where the Federal Government has acquired some degree of ownership of an area in a State but has not obtained any measure of the State's legislative authority over that area. (footnotes omitted)



federal jurisdiction that are not subject to the right to serve state process, military authorities<sup>112</sup> determine whether the member will voluntarily accept service of process.<sup>113</sup> Before making a decision, military authorities may give the member an opportunity to obtain legal advice.<sup>114</sup> If the member refuses to accept service, the military authorities notify the party requesting service that the nature of exclusive federal jurisdiction precludes service.<sup>115</sup> Air Force policy deviates from this process by allowing process servers on areas of exclusive federal jurisdiction.<sup>116</sup>

In areas of military control where the state has reserved the right to serve process, in areas of concurrent jurisdiction, or where the United States has only a proprietary interest, the process is slightly different.<sup>117</sup> If the individual declines to accept service of process, military authorities allow the requesting party to serve it pursuant to applicable state law.<sup>118</sup> In such cases, military authorities may impose reasonable restrictions on the service to prevent interference with mission accomplishment and to preserve good

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*Id.*

<sup>112</sup> In this context, the term "military authorities" includes commanders or supervisors.

<sup>113</sup> 32 C.F.R. §§ 516.10(d), 720.20(a) (1995).

<sup>114</sup> For instance, Army policy clearly extends this right to soldiers. *See* 32 C.F.R. § 516.10(d) (1995). Navy policy does not appear to extend this privilege. *See* 32 C.F.R. § 720.20(a) (1995).

<sup>115</sup> *See* 32 C.F.R. § 516.10(d) (1995).

<sup>116</sup> *See* DOD REPORT, *supra* note 103, at 3, part III.A.2.

<sup>117</sup> *See* 32 C.F.R. § 516.10(d) (1995).

<sup>118</sup> *See id.*

order and discipline.<sup>119</sup> Restrictions may include designating a location for the service of process.<sup>120</sup> Military commanders can then order military members to the designated location;<sup>121</sup> commanders do not have that authority over civilian employees.

Procedures differ slightly in cases where the forum court is not in the same state as the area under military control. In those cases, military policy does not require the member to accept process.<sup>122</sup> If the member declines to accept process, the military authorities generally notify the process server of the declination and provide no further assistance.<sup>123</sup>

2. *Outside the United States*--The rules for overseas assistance are similar to those described under the voluntary acceptance procedures for areas of exclusive jurisdiction. They differ, however, because military authorities may act as physical conduits<sup>124</sup> for service of process.<sup>125</sup> This only

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<sup>119</sup> See *id.* § 720.20(a) (1995).

<sup>120</sup> See *id.* (If a civilian won't agree to report to a location for service of process, the process server may be escorted to the location of the civilian in order that process may be served. Normally, it is better for the civilian to go to the location designated by military authorities to prevent embarrassment in the workplace.).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See *id.* The Air Force policy is more liberal. See DOD REPORT, *supra* note 103.

<sup>124</sup> See Air Force Opinion, *supra* note 108, at 242. The party requesting service of process actually sends it to the commander for delivery to the military member. The commander will physically deliver the document, but only if the member voluntarily agrees to accept the service of process. In such cases, the commander is not a process server but merely a conduit. *Id.*

<sup>125</sup> DOD REPORT, *supra* note 103, at 3, part III.A.2. See also 32 C.F.R. § 516.12(c) (1995), which implies that an official may actually serve the process ("If a DA official

occurs when a military member voluntarily agrees to accept service of process.<sup>126</sup> When a member declines to accept, the military authority notifies the requesting party of the declination.<sup>127</sup> The military authority also advises the requesting party to follow procedures prescribed by the law of the foreign country concerned or applicable international agreements, like the Hague Service Convention.<sup>128</sup>

C. *Impact of the Posse Comitatus Act*

Posse Comitatus Act<sup>129</sup> limitations help shape military policies regarding assistance with service of process. This act provides that:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.<sup>130</sup>

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receives a request to *serve* process. . . . (emphasis added)). Historically, the military services have not recognized process serving as a federal function or one of their official duties. *See generally* Lamont v. Haig, 539 F. Supp. 552, 557 (D.C.S.D. 1982); Air Force Opinion, *supra* note 108; 32 C.F.R. 720.20(a) (1995) (“[t]he commanding officer is not required to act as a process server.”)

<sup>126</sup> 32 C.F.R. § 516.12(c) (1995).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> 18 U.S.C. § 1385 (1994).

<sup>130</sup> *Id.* *See also supra* note 108, at 242, providing that:

Our federal system of government was founded on the principle that United States military forces were established to defend against external threats and

Over the past century, the military services have avoided directly serving process of state courts based on concerns that such help would violate the Posse Comitatus Act.<sup>131</sup> In the absence of enabling legislation, the position of the military services is that service of process is a state responsibility and that military authorities cannot act as state court officials for the purpose of enforcing state law, which includes the service of state court process.<sup>132</sup> DoD policy extends application of the Posse Comitatus Act to the Navy.<sup>133</sup>

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were not to be used to enforce internal domestic laws. Short of a formal declaration of martial law, Federal troops are to be used in a limited backup role where state police forces are in temporary need of assistance. Clearly, the protection of life and property and the maintenance of law and order within any state are the primary responsibilities of the State and local authorities. During the reconstruction period after the Civil War these constitutional distinctions were not strictly adhered to and, as a result, there were a number of abuses. In response, Congress in 1878 passed the so-called Posse Comitatus Act . . . to prevent the unauthorized use of Federal troops to execute the domestic laws of the United States. This act remains valid today and confirms the long-standing policy that federal forces are not to be used in a state police enforcement role unless expressly authorized by the Constitution or Act of Congress.

*Id.*

<sup>131</sup> See generally *Lamont v. Haig*, 539 F. Supp. 552, 555 (D.C.S.D. 1982); Air Force Opinion, *supra* note 108, at 242.

<sup>132</sup> *Id.*

<sup>133</sup> DEP'T OF DEFENSE DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. C, encl. 4 (15 Jan. 1986) [hereinafter Posse Comitatus Act Directive]. The "Posse Comitatus Act . . . is applicable to the Department of Navy and the Marine Corps as a matter of DoD policy, with such exception as may be provided by the Secretary of the Navy on a case-by-case basis"). Also, approval by the Secretary of Defense is required when the use of military power would be regulatory, proscriptive, or compulsory. *Id.*

## V. Part Four: Other Laws and Procedures Related to Service of Process

This part begins with an explanation of jurisdiction. It then discusses due process limitations stemming from the United States Constitution that require adequate notice, and, in some cases, "minimum contacts."<sup>134</sup> Finally, this part addresses other limitations on service of process, such as those imposed by state law; or, in cases where service of process is overseas, restrictions that apply because of the internal laws of foreign nations or international agreements. These laws and procedures directly relate to service of process and must be understood in order to assess recommendations for improving it in child support enforcement actions.

### A. *Jurisdiction*

1. *Generally*--Prior to serving process, a state must have the authority to subject a person to the process of its judicial or administrative tribunals.<sup>135</sup> This principle is commonly known as "judicial jurisdiction."<sup>136</sup> United States

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<sup>134</sup> See *Kulko v. Superior Court of California*, 436 U.S. 84 (1978); *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

<sup>135</sup> See BORN & WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 20 (1989) [hereinafter BORN & WESTIN].

<sup>136</sup> *Id.* (citation omitted). Judicial jurisdiction is also called "jurisdiction to adjudicate." It is distinguishable from "legislative" or "proscriptive" jurisdiction (the

legal practice divides judicial jurisdiction into three categories: (1) *in personam* (or personal) jurisdiction; (2) *in rem*<sup>137</sup> jurisdiction; and (3) *quasi in rem*<sup>138</sup> jurisdiction.<sup>139</sup>

"Personal jurisdiction involves the power of a court to adjudicate a claim against the defendant's person and to render a judgment enforceable against the defendant and [the defendant's] assets."<sup>140</sup> It is personal jurisdiction, not *in rem* or *quasi in rem*, that gives a court the power to establish a child support order or make a paternity determination.<sup>141</sup> For the remainder of this part, the term "jurisdiction" will mean "personal jurisdiction."

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authority of a state to make laws) and "enforcement" jurisdiction (the authority of a state to compel compliance, or punish noncompliance, with its laws). Judicial jurisdiction operates between these two types of jurisdiction. *Id.*

<sup>137</sup> See BLACK'S LAW DICTIONARY 793 (6th ed. 1990) ("A technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*." An *in rem* proceeding "encompass[es] any action brought against a person in which essential purpose of suit it to determine title to or to affect interests in specific property located within territory over which court has jurisdiction.").

<sup>138</sup> *Id.* at 793, 794.

*Quasi in rem.* A term applied to proceedings which are not strictly and purely *in rem*, but are brought against the defendant personally, though the real object is to deal with particular property or subject property to the discharge of claims asserted; . . . An action in which the basis of jurisdiction is the defendant's interest in property, real or personal, which is within the court's power, as distinguished from *in rem* jurisdiction in which the court exercises power over the property itself, not simply the defendant's interest therein.

*Id.*

<sup>139</sup> BORN & WESTIN, *supra* note 134.

<sup>140</sup> *Id.*

<sup>141</sup> Although *in rem* or *quasi in rem* jurisdiction may form the basis of a later child support enforcement action involving the property of a defendant that might be used to satisfy an arrearage for nonsupport.

2. *Due Process Limitations on Jurisdiction*--There are two primary due process considerations related to service of process. The first concern is whether the defendant received proper notice of the legal proceeding against him or her.<sup>142</sup> The second concern arises when the defendant resides outside the forum state. In such cases, the defendant must have sufficient minimum contacts with the forum state to establish a constitutionally acceptable basis for its courts to exercise jurisdiction.<sup>143</sup>

a. *Notice*--Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections."<sup>144</sup> "The notice must be of such nature as reasonably to convey the required information."<sup>145</sup> Furthermore, the method chosen to deliver the notice must comport with state law and constitutional parameters.<sup>146</sup>

b. *Minimum Contacts*--An explanation of the historic underpinnings leading to the requirement for minimum contacts

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<sup>142</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)

<sup>143</sup> *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

<sup>144</sup> *Mullane*, 339 U.S. 306 (1950).

<sup>145</sup> *Id.*

<sup>146</sup> *See generally* *Milliken v. Meyer*, 311 U.S. 457 (1940); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

between a defendant and a forum state is critical to understanding the due process limitations on service of process. Over the past century, the due process limits on jurisdiction have changed dramatically.<sup>147</sup> In 1870, the United States Supreme Court, in *Pennoyer v. Neff*,<sup>148</sup> held that the Due Process Clause of the Fourteenth Amendment prohibited state courts from asserting personal jurisdiction over defendants not found within the territory of the state.<sup>149</sup> The *Pennoyer* Court based its holding on two principles of international law that it found had application to interstate proceedings.<sup>150</sup> In particular, the Court found that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory" and that "no State can exercise direct jurisdiction and authority over persons and property without its territory."<sup>151</sup>

As a result of the industrial era and the rapid progression of manufacturing and commerce that operated and organized without regard to interstate and international boundaries, states needed more flexible rules to regulate those activities.<sup>152</sup> In 1945, the Supreme Court responded with its landmark decision, *International Shoe v. Washington*,<sup>153</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> BORN & WESTIN, *supra* note 134, at 23.

<sup>150</sup> *Id.*

<sup>151</sup> *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

<sup>152</sup> BORN & WESTIN, *supra* note 134, at 24.

<sup>153</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).



that significantly modified the *Pennoyer* strict territorial view of judicial jurisdiction.<sup>154</sup> The decision in *International Shoe* established the "minimum contacts" test.<sup>155</sup> Under this test:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. . . . It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. (citation omitted)<sup>156</sup>

Following *International Shoe*, the Supreme Court resorted to a two-part analysis of the "minimum contacts" test.<sup>157</sup> Under the analysis, the Court first asks whether the defendant has "purposefully availed" itself of the protections and benefits of the forum's law.<sup>158</sup> Second, the Court asks whether the exercise of jurisdiction over the defendant would be "reasonable."<sup>159</sup> Applying these criteria, courts will find jurisdiction based on domicile,<sup>160</sup> continuous activities within

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<sup>154</sup> BORN & WESTIN, *supra* note 134, at 24.

<sup>155</sup> *Id.*

<sup>156</sup> *International Shoe*, 326 U.S. at 316.

<sup>157</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (footnote omitted).

<sup>158</sup> BORN & WESTIN, *supra* note 134, at 44 (footnote omitted) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980)).

<sup>159</sup> *Id.* at 43 (footnote omitted)

<sup>160</sup> *Milliken v. Meyer*, 311 U.S. 457 (1940).

the forum,<sup>161</sup> and even transitory presence of the defendant in the forum.<sup>162</sup> "Although the courts have applied additional analysis in determining the minimum contacts test under *International Shoe*, it remains the seminal precedent for determining due process limitations on judicial jurisdiction."<sup>163</sup>

3. *Statutory Authorizations for Establishing Jurisdiction*--In addition to the foregoing constitutional considerations, there must be a statutory authorization for jurisdiction over defendants who are located outside the forum state.<sup>164</sup> "Virtually all the states of the Union,"<sup>165</sup> have

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The authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. Enjoyment of the privileges of residence with the state, and the attendant right to invoke the protection of its laws, are inseparable from the various incidences of state citizenship. . . . One such incident of domicile is amenability to suit within the state even during sojourns without the state, where the state has provided and employed a reasonable method for apprising such an absent party of the proceedings against him.

*Id.* at 163.

<sup>161</sup> See generally *Helicopteros Nacionales De Colombia*, 466 U.S. 408 (1984).

<sup>162</sup> See *International Shoe*, 326 U.S. 310, 320 (1945). (holding that "[d]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'") (citation omitted).

<sup>163</sup> BORN & WESTIN, *supra* note 134, at 24.

<sup>164</sup> *Id.* at 20.

<sup>165</sup> *Id.* (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 3, intro. note (1971); R. CASAD, JURISDICTION IN CIVIL ACTIONS § 401 (1983 & Supp. 1986) (describing and reproducing state long-arm statutes); 2 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 4.41-1[1] (3d ed. 1988)).

passed long-arm statutes<sup>166</sup> permitting them to serve process and establish jurisdiction on defendants physically located outside their territory. Such defendants must have specified "minimum contacts"<sup>167</sup> with the state before jurisdiction

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<sup>166</sup> See, e.g., N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1996 pocket part) provides long-arm jurisdiction for New York courts as follows:

(a) Acts which are the basis of JURISDICTION. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal JURISDICTION over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
  - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
  - (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or

(b) Personal JURISDICTION over non-resident defendant in matrimonial actions or family court proceedings. A court in any matrimonial action or family court proceeding involving a demand for support, alimony, maintenance, distributive awards or special relief in matrimonial actions may exercise personal JURISDICTION over the respondent or defendant notwithstanding the fact that he or she no longer is a resident or domiciliary of this state, or over his or her executor or administrator, if the party seeking support is a resident of or domiciled in this state at the time such demand is made, provided that this state was the matrimonial domicile of the parties before their separation, or the defendant abandoned the plaintiff in this state, or the claim for support, alimony, maintenance, distributive awards or special relief in matrimonial actions accrued under the laws of this state or under an agreement executed in this state. . . .

<sup>167</sup> See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (explaining the standards for such contacts).

attaches.<sup>168</sup> While state long-arm statutes differ, each generally falls under one of three basic statutory approaches: (1) statutes that authorize service to the fullest extent permitted by the United States Constitution;<sup>169</sup> (2) statutes that use brief, general formulae to define the circumstances in which personal jurisdiction may be asserted;<sup>170</sup> and (3) statutes that exhaustively detail the circumstances under which states claim personal jurisdiction.<sup>171</sup> State courts

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<sup>168</sup> BORN & WESTIN, *supra* note 134, at 20-21 (the defendant may be located in other states or outside the country).

<sup>169</sup> *Id.* To the fullest extent permitted by the Constitution generally means as limited by the Due Process Clause of the Fourteenth Amendment. An example is California's long-arm statute that states that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States." *Id.*

<sup>170</sup> *Id.* For example, "the Texas long-arm statute provides for jurisdiction over any non-resident who 'engages in business' in the state." *Id.*

<sup>171</sup> *Id.* This is the most common type of Long-arm statute. For example, the Illinois long-arm statute provides:

§ 2-209. Act submitting to jurisdiction--Process. (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

- (1) The transaction of any business within this State;
- (2) The commission of a tortious act within this State;
- (3) The ownership, use, or possession of any real estate situated in this State;
- (4) Contracting to insure any person, property or risk located within this State at the time of contracting;
- (5) With respect to actions of dissolution of marriage, declaration of invalidity of marriage and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;
- (6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, the performance of an act of sexual intercourse within this State during the possible period of conception;

exercise primary responsibility for interpreting the reach of their state long-arm statutes,<sup>172</sup> except when their interpretation allegedly exceeds due process limitations under the United States Constitution.<sup>173</sup> In such cases, federal courts must exercise their jurisdiction to determine the validity of a state's long-arm statute.<sup>174</sup>

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- (7) The making or performance of any contract or promise substantially connected with this State;
  - (8) The performance of sexual intercourse within this State which is claimed to have resulted in the conception of a child who resided in this State;
  - (9) The failure to support a child, spouse or former spouse who has continued to reside in this State since the person either formerly resided with them in this State or directed them to reside in this State;
  - (10) The acquisition of ownership, possession or control of any asset or thing of value present within this State when ownership, possession or control was acquired;
  - (11) The breach of any fiduciary duty within this State;
  - (12) The performance of duties as a director or officer of a corporation organized under the laws of this State or having its principal place of business within this state;
  - (13) The ownership of an interest in any trust administered within this State; or
  - (14) The exercise of powers granted under the authority of this State as a fiduciary.
- (b) A court may exercise jurisdiction in any action arising within or without this State against any person who:
- (1) Is a natural person present within this State when served;
  - (2) Is a natural person domiciled or resident within this State when the cause of action arises, the action was commenced, or process was served;
  - (3) Is a corporation organized under the laws of this State; or
  - (4) Is a natural person or corporation doing business within this State.
- (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

ILL. ANN. STAT. ch. 735, act 5, art. II, part 2 (Smith-Hurd 1996).

<sup>172</sup> BORN & WESTIN, *supra* note 134, at 20-21.

<sup>173</sup> See generally *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878).

<sup>174</sup> *Id.*

## B. Methods of Service

This section addresses methods of service of process both within and outside the United States. However, it does not include a discussion of service of process overseas pursuant to international agreements.<sup>175</sup>

1. Within the United States--Service of process consists of:

[H]and delivery to the defendant of the plaintiff's complaint together with a "summons" directing the defendant to answer the complaint. In recent years, other methods of service, including service by registered mail, have become more common. Although process was historically served by an official of the forum court, service in the United States is now commonly effected by nongovernmental means. Service in domestic action is often made by private firms specializing in the service of process or by counsel for the plaintiff.<sup>176</sup>

Within the United States, service of process is a fairly routine and mechanical exercise.<sup>177</sup> This cannot be said for service of process overseas, which can be a difficult and uncertain undertaking.<sup>178</sup>

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<sup>175</sup> See *supra* part. V.C. for a discussion of service of process under international agreements.

<sup>176</sup> BORN & WESTIN, *supra* note 134, at 119.

<sup>177</sup> *Id.* at 120

<sup>178</sup> *Id.* One view of overseas service of process is that it is "a frequently lengthy, expensive and twisting process bordered on all sides with fatal pitfalls. *Id.* (citing Gary N.

2. *Outside the United States*--Assuming that a state court has jurisdiction over a defendant located abroad, there must be proper service of process on the defendant prior to the court exercising jurisdiction.<sup>179</sup> Generally:

U.S. law recognizes three basic mechanisms for serving U.S. process on persons located abroad: (1) Various federal or state statutes or rules of court provide for extraterritorial service of process by the plaintiff directly to the foreign defendant;<sup>180</sup>

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Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 Int'l Law 637, 638 (1980)) (footnote omitted).

<sup>179</sup> *Omni Capital International v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

<sup>180</sup> For example, FED. R. CIV. P. 4 provides rules for service of process abroad. Many states have modeled their long-arm statutes after FED. R. CIV. P. 4. The following is a brief synopsis of Federal Rule of Civil Procedure 4 as found in Leonard A. Leo, *The Interplay Between Domestic Rules Permitting Service Abroad by Mail and the Hague Convention on Service: Proposing An Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335, 338 (1989):

FRCP is a supplement that provides five alternative methods for serving foreign parties abroad. A party may serve a foreign defendant (1) in a manner provided by the foreign nation for service involving litigation within its own courts of general jurisdiction; (2) as directed by a foreign authority's response to a letter rogatory, so long as the method is reasonably calculated to give actual notice; (3) by personal service to the party, an officer of a corporate party, or the party's agent; (4) by forms of mail requiring a signed receipt; or (5) in a manner prescribed by an order of the district court.

a. *Authority to Serve*: FRCP 4(i) does not independently authorize service abroad. To invoke FRCP 4(i), federal or state law must authorize extraterritorial service; a party may only use the five alternative methods of service "when the

(2) U.S. courts can issue letters rogatory requesting foreign courts to assist in serving U.S. process on persons located abroad and (3) the United States is a party to several international agreements<sup>181</sup> that provide either mandatory or

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federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held." Under FRCP 4(e), a party may serve an individual who is not an inhabitant of the forum state in which the district court sits whenever a state or federal statute permits such extraterritorial service. Therefore, before considering the alternatives set forth in subdivision (i), a party must determine whether any statutes permit service abroad.

b. Manner of Service: Once a party determines that it has the authority to serve abroad, it must then decide the method or manner of service. As a supplement, FRCP 4(i) is not the exclusive method of service abroad. For instance, FRCP 4(e) permits service in the manner prescribed either by statute or by the Federal Rules. Alternatively, a party may choose the flexibility provided under FRCP 4(i) to serve abroad. Among the alternatives from which to choose under FRCP 4(i), a party may serve a foreign defendant by mail.

c. State Service Provisions: State service provisions are important for two reasons. First, the state service rule is independently significant where an American plaintiff sues a foreign defendant in state court. Second, FRCP 4(e) permits a plaintiff in federal court to serve a foreign defendant in a manner prescribed by state law. The state provisions applicable in both contexts generally permit service abroad by mail without any observable limitations. (footnotes omitted)

*Id.*

<sup>181</sup> See, e.g., Hague Convention & Inter-American Convention on Letters Rogatory, signed in Panama on January 30, 1975, reprinted in 14 INT'L LEGAL MAT. 339 (1975) and Additional Protocol to the Inter-American Convention on Letters Rogatory, signed in



optional mechanisms for extraterritorial service of process.<sup>182</sup>

In addition to these three methods, officers of the Foreign Service may serve process abroad, but only at the direction of the United States Department of State.<sup>183</sup> Under current policy, the Department of State normally prohibits such service unless there is an exceptional case involving litigation affecting the United States Government.<sup>184</sup>

a. *Federal or State Statutes Providing for Service Abroad*--Under United States practice, federal<sup>185</sup> and state rules provide the common method for extraterritorial service of process and do not require the affirmative cooperation of foreign authorities. There are different state rules on service of process. Many states have enacted rules similar to

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Montevideo, Uruguay on May 8, 1979, *reprinted in* 18 INT'L LEGAL MAT. 1238 (1979); *see also*, BORN & WESTIN, *supra* note 134, at app. E, 670. The Inter-American Convention is substantively similar to the Hague Convention and will not be discussed. *See* BORN & WESTIN, *supra* note 134, at 138.

<sup>182</sup> BORN & WESTIN, *supra* note 134, at 121.

<sup>183</sup> 22 C.F.R. § 92.85 (1995). *See also* U.S. Department of Justice Memorandum No. 386, *reprinted in* 16 INT'L LEGAL MAT. 1331 (1977). Note, § 92.85 states that "[t]he service of process and legal papers is not normally a Foreign Service function. Except when directed by the Department of State, officers of the Foreign Service are prohibited from serving process or legal papers or appointing other persons to do."

<sup>184</sup> BORN & WESTIN, *supra* note 134, at 121. "Although the Department of State generally will not assist in the service of process, the Office of Citizens Consular Services of the Department of State provides useful information regarding service requirements in foreign countries. Overseas U.S. embassies are also helpful in providing information in some circumstances." *Id.*

<sup>185</sup> FED. R. CIV. P. 4.

Federal Rule of Civil Procedure 4.<sup>186</sup> Likewise, several states have adopted the Uniform Interstate and International Procedure Act,<sup>187</sup> which provides a condensed version of Rule 4.<sup>188</sup> While some states have liberalized their service of process provisions to the maximum extent permitted by the constitution, others have not.<sup>189</sup> Some cases, therefore, may require resort to the time-consuming letters rogatory procedure.<sup>190</sup>

b. *Letters Rogatory*--Letters Rogatory (also known as "letters of request"<sup>191</sup>) provide another method for service of process abroad. A letter rogatory is a request for assistance<sup>192</sup> (for example, with service of process) from the court of one country to the court of another country.<sup>193</sup>

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<sup>186</sup> BORN & WESTIN, *supra* note 134, at 132.

<sup>187</sup> Uniform Interstate and International Procedure Act, *reprinted in* 11 AM. J. COMP. L. 417 (1962).

<sup>188</sup> BORN & WESTIN, *supra* note 134, at 132.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> U.S. Department of Justice Instructions for Serving Foreign Judicial Documents in the U.S. and Processing Requests for Serving American Judicial Documents Abroad, *reprinted in* 16 INT'L LEGAL MAT. 1331, 1337 (1977).

<sup>192</sup> A copy of a request may be found in U.S. Department of Justice Memorandum No. 386, *reprinted in* 16 INT'L LEGAL MAT. 1331, app. E. (1977).

<sup>193</sup> 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE §§ 3-1 to 3-47 (1984 & Supp. 1986).

Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made and being usually granted, by reason of the comity existing between nations in ordinary peaceful times.

Courts typically honor such requests as a matter of comity.<sup>194</sup> "The letter rogatory must be issued by the court in which the plaintiff's action has been filed . . . [and] comply with U.S. procedure,<sup>195</sup> as well as with the laws and customs of the receiving state."<sup>196</sup> Federal Rule of Civil Procedure 4(i)(1)(B) and some state statutes make specific provisions for the use of letters rogatory.<sup>197</sup> Even though letters rogatory are received and transmitted through judicial channels, American plaintiffs must ensure that the actual method used to serve process on the defendant is "reasonably calculated to give actual notice."<sup>198</sup>

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*Id.*

<sup>194</sup> See *Hilton v. Guyot*, 159 U.S. 113 (1895). Comity is defined as:

The recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and to the rights of its own citizens or of other persons who are under the protection of its laws.

*Id.*

<sup>195</sup> BORN & WESTIN, *supra* note 134, at 134 (A U.S. court may transfer the request directly to a foreign court; or transmittal may be made through diplomatic counselor channels - See 28 U.S.C. § 1781 (1994), that authorizes the United States Department of State to receive and transmit letters rogatory).

<sup>196</sup> BORN & WESTIN, *supra* note 134, at 134 (The formalities usually include the signature of a judge of the issuing court, an authenticated seal of the issuing court, and a translation of the request and all accompanying documents).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 135 (FED. R. CIV. P. 4(i)(1)(B) imposes this requirement, which is similar to the demands of the due process clause) (citations omitted).

Letters rogatory are advantageous because they are unlikely to provoke foreign government objection, and, in some instances, are the only authorized means of service.<sup>199</sup> The disadvantages of letters rogatory include their voluntary nature; the uncertainty of whether the service of process method chosen by the foreign court comports with American standards of due process; and the length of time it takes to complete service of process, especially when parties to litigation use diplomatic channels.<sup>200</sup> In sum, the letters rogatory procedure is "complex, costly, and time consuming."<sup>201</sup> Accordingly, this procedure should be a method of last resort for American litigants.<sup>202</sup>

c. *Noncompliance with Foreign Law*--One factor that frequently arises in selecting a mechanism for

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<sup>199</sup> *Id.*

<sup>200</sup> Gary N. Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT'L LEGAL MAT. 637, 642 (1980).

It is commonly necessary to proceed through diplomatic channels via letters rogatory, which means that the process has to be sent from the Clerk of Court to the state Secretary of State. The state Secretary of State authenticates the seal and signature of the Clerk of Court or judge and sends the document to the U.S. State Department. The U.S. Department of State authenticates the seal of the state Secretary of State and transmits it to the embassy of the country in which process is to be served. That embassy authenticates the seal of the Department of State and then transmits it down the hierarchical chain of that country's institutions until it finally comes to the official who will serve it. That official's return is then authenticated and transmitted back up to the embassy in Washington, and thence back down to the issuing court.

*Id.*

<sup>201</sup> R. CASAD, JURISDICTION IN CIVIL ACTIONS § 4.06(2) (1983 & Supp. 1986).

<sup>202</sup> *Id.*

extraterritorial service is the effect of noncompliance with foreign law.<sup>203</sup> Department of Justice guidance provides that:

Absent a treaty, service abroad must be made (1) in accordance with domestic law regulating extraterritorial service, and (2) in a manner which will comport with the laws of the foreign country in which the document is to be served. A note of caution is in order here: service of judicial documents is regarded in civil law countries as the performance of a judicial function, and the laws of some countries (e.g., Austria, Japan, Switzerland, Yugoslavia) make it an offense for foreign officials to perform, without express permission from the local government, judicial functions within their territories. In countries where service is deemed a judicial function, American documents should be served only by means of a letter of request or by mail (but note, Switzerland objects even to the latter mode of service).<sup>204</sup>

Despite the foregoing guidance, the majority view amongst American courts is that federal and state procedures are the "sole requirements that extraterritorial U.S. service must satisfy."<sup>205</sup> Therefore, service that is defective under

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<sup>203</sup> See, e.g., *ALCO Standard v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972).

<sup>204</sup> U.S. Department of Justice Instructions for Serving Foreign Judicial Documents in the U.S. and Processing Requests for Serving American Judicial Documents Abroad, *reprinted in* 16 INT'L LEGAL MAT. 1331, 1337 (1977).

<sup>205</sup> BORN & WESTIN, *supra* note 134, at 128. Note:

[although *ALCO Standard* represents the majority rule, there is a least one case in which a U.S. court relied upon foreign law to require service abroad through letters rogatory. After a series of incidents in the 1950s involving attempts to serve administrative subpoenas in Switzerland, the Swiss government lodged a formal protest with the United States Department of State. The Department of State responded in an aide-memoir apologizing for

foreign law usually will not invalidate service for purposes of U.S. law,<sup>206</sup> at least under the majority view.<sup>207</sup>

While the judicial action may continue pursuant to the majority view, U.S. litigants should be aware of the risks they take when violating foreign restrictions on service of process.<sup>208</sup> One possible consequence of service abroad in

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the "inadvertent violation of applicable Swiss law" and stating that the Department of State had "informed the competent United States authorities of the Swiss law referred to" and that such action "will avoid any future transmittals of such documents in a manner inconsistent with Swiss law. . . ." Thereafter, the Administrative Conference of the United States courts issued a directive requesting that any service to be effected on Swiss soil be done pursuant to letter rogatory, rather than the normal U.S. procedures for extraterritorial service. This led the court in *R.M.B. Electrostat v. Lectra Trading A.G.*, No. 82-1844 (E.D. Pa. Jan. 17, 1983), to require use of letters rogatory when serving a civil complaint and summons in Switzerland. The court apparently reasoned that drafters of Federal Rule 4 did not intend to authorize service abroad in circumstances that would violate foreign and international law.

*Id.* at 128-129.

Also, in *Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984), the Court found that:

Service of a subpoena was 'compulsory process,' which unlike mere 'notice' of the commencement of an action, constituted an assertion of U.S. enforcement jurisdiction. Moreover, the court concluded, unless the service of compulsory process was acceptable to the foreign state, it constituted an infringement of the foreign state's sovereignty in violation of international law.

BORN & WESTIN, *supra* note 134, at 130.

<sup>206</sup> See *ALCO Standard v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972). This is true unless there is an applicable treaty, such as the Hague Service Convention. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

<sup>207</sup> Stephen B. Burbank, *IV. Practice and Procedure: The World in Our Courts*, 89 MICH. L. REV. 1456, 1477 (1991).

<sup>208</sup> See BORN & WESTIN, *supra* note 134, at 127.

violation of foreign law is the imposition of criminal or civil sanctions against the process server.<sup>209</sup> Many civil law nations view the service of process and the taking of evidence as public acts that require the participation or supervision of the local judiciary.<sup>210</sup> Some of these civil law nations have imposed sanctions against U.S. process-servers for attempting to personally deliver U.S. complaints and summons to foreign defendants.<sup>211</sup> Additionally, service in violation of another country's laws can provoke vigorous foreign government protests that embarrass U.S. plaintiffs and affect the U.S. court's overall view of the suit.<sup>212</sup> Finally, service abroad in violation of foreign law can jeopardize the enforceability within the foreign nation of any U.S. judgment that the plaintiff obtains.<sup>213</sup>

*C. Service of Process Overseas Pursuant to International Agreement*

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<sup>209</sup> See U.S. Department of Justice Memorandum No. 386 at 20 (1977), *reprinted in* 16 INT'L LEGAL MAT. 1331, 1338 (1977) (U.S. government attorneys sued for trespass for serving a subpoena in the Bahamas; U.S. government attorney indicted for serving subpoena in France); Fed. R. Civ. P. 4 (Practice Commentary) (urging compliance with foreign law "lest the return [of service] consist of a large envelope containing only the process server").

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> BORN & WESTIN, *supra* note 134, at 132.

<sup>213</sup> *Id.* (citing as an example Germany's Code of Civil Procedure, § 328, which provides that: "[a] judgment of a foreign court shall not be recognized. . . if a defendant who has not entered an appearance on the merits was not properly served."). Note, this is not an inhibiting factor in child support enforcement involving American litigants and service members because there will be no need to enforce the judgment in a foreign jurisdiction (e.g., the member's pay will be garnished through the Defense Finance and Accounting Office located in the United States).

As demonstrated in the preceding sections of this part, overseas service of process is complex and risky. As a result, several nations have entered into agreements to help facilitate service of process. The primary international agreement regarding service of process, to which the United States is a signatory, is the Hague Service Convention.<sup>214</sup>

1. *Development and Purpose*--Following World War II, United States citizens and business firms substantially increased their overseas activities and investments.<sup>215</sup> The United States Government also instituted trade and aid programs of considerable magnitude that led to an interrelation of financial and commercial life in the United States and abroad to a degree unparalleled in history.<sup>216</sup> However, a corresponding modernization of "international judicial procedure"<sup>217</sup> did not accompany the expansion of business activities.<sup>218</sup> The increased volume of international litigation magnified past problems with international judicial assistance.<sup>219</sup>

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<sup>214</sup> Hague Service Convention, *supra* note 23.

<sup>215</sup> *Commission on International Rules of Judicial Procedure--Establishment*, S. Rep. No. 2392, 85th Cong. 2d. Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5201 [hereinafter *Commission Establishment*].

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* ("International judicial procedure" has also been referred to as "international judicial assistance.").

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*



This whole problem of international judicial procedure has been complicated by the fact that courts in the United States operate under the general principles of the Anglo-American common-law system and other countries of Latin America and continental Europe operate under various modifications of the civil-law system. The civil-law system has as its basis the ancient system of Roman law and the Code Napoleon. Under the civil law, the fundamental concepts of procedure are very different from those of common-law systems. This particularly is true as to the various functions in litigation involving judges, lawyers, and litigants. *The difference in fundamental concepts have served to compound the difficulties in that the lawyers and judicial officials operating within their respective systems misunderstand each other's procedures and the problems* (emphasis added).<sup>220</sup>

In addition to misunderstandings, international judicial assistance suffered from service of process procedures that failed to meet minimum standards of due process within the United States.<sup>221</sup> For example, there were procedures that failed to ensure notice, or timely notice, thereby producing unfair default judgments.<sup>222</sup>

Particularly controversial was a procedure, common among civil-law countries, called "notification au parquet,"<sup>223</sup> which permitted delivery of process to

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<sup>220</sup> *Id.* at 5202 ("In addition to countries operating under various modifications of the civil law systems, there are other countries which operate under Islamic law, and newly created countries such as Indonesia, India, Pakistan, Burma, and Israel which have adopted procedural systems which are a combination of several different systems").

<sup>221</sup> *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

<sup>222</sup> *Id.* (Brennan, Marshall, & Blackmun, JJ., concurring).

<sup>223</sup> *Id.* at 709. The head of the United States delegation to the Convention described "notification au parquet" as follows:

a local official who was then ordinarily supposed to transmit the document abroad through diplomatic or other channels. Typically, service was deemed complete upon delivery of the document to the official whether or not the official succeeded in transmitting it to the defendant and whether or not the defendant otherwise received notice of the pending lawsuit.<sup>224</sup>

American litigants desiring to serve process abroad were faced with the challenge of finding service methods that met both constitutional due process standards and were consistent with the local laws of the foreign state.<sup>225</sup> American litigants also found service of process lengthy, cumbersome, costly, and often insufficient.<sup>226</sup> Unlike foreign countries,

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This is a system which permits the entry of judgment in personam by default against a nonresident defendant without requiring adequate notice. There is also no real right to move to open default judgment or to appeal, because the time to move to open the default judgment or to appeal, because the time to move to open judgment or to appeal will generally have expired before the defendant finds out about the judgment. 'Under this system of service, the process-server simply delivers a copy of the writ to a public official's office. The time for answer begins to run immediately. Some effort is supposed to be made through the Foreign Office and through diplomatic channels to give the defendant notice, but failure to do this has no effect on the validity of the service . . . .

"There are no . . . limitations and protections [comparable to due process or personal jurisdiction] under the notification au parquet system. Here jurisdiction lies merely if the plaintiff is a local national; nothing more is needed."

*Id.*

<sup>224</sup> *Id.*

<sup>225</sup> BORN & WESTIN, *supra* note 134, 131-33.

<sup>226</sup> See generally *Commission Establishment*, *supra* note 214, at 5202.

American litigants could not count on consular offices for service of process.<sup>227</sup>

Hurdles facing foreigners were even more onerous due to the American federated system and the difficulty of finding an "official" in the United States willing to serve process.<sup>228</sup> Under the federated system, foreign litigants had to deal with forty-nine separate procedural jurisdictions<sup>229</sup> within the United States.<sup>230</sup> Also, most foreign nations operated under civil law systems mandating "official" service through governmental channels.<sup>231</sup> Because methods of service within the United States under the common law system usually entailed service by nongovernment officials (for example, a paid process server or an attorney), foreign nations believed that United States practices for serving process frustrated the ability of their national's to effect "official" service.<sup>232</sup>

In 1964, the United States Congress unilaterally acted to improve international service of process problems by enacting Public Law 88-619.<sup>233</sup> This law expressly authorized United

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<sup>227</sup> See Stephen F. Downs, Note, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 2 CORNELL INT'L L.J. 125, 128-129 (1969).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 5206 (The author describes 48 State court systems rather than 50 because neither Alaska nor Hawaii had yet received statehood).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> See Downs, *supra* note 226.

<sup>233</sup> Pub. L. 88-619, reprinted in 3 INT'L LEGAL MAT. 1081 (1964). This law amended sections of title 18 of the United States Code dealing with international judicial procedure.

States district courts, based on a foreign letter rogatory, to order service of documents on persons within their district in connection with a proceeding in a foreign or international tribunal.<sup>234</sup> It also permitted the Department of State to transmit foreign letters rogatory between foreign courts and American courts.<sup>235</sup> This action by Congress improved the ability of foreign litigants to serve process within the United States but did not enhance the ability of American litigants to serve process abroad. Congress hoped their unilateral action would induce foreign countries similarly to adjust their procedures.<sup>236</sup> This effort occurred shortly before the Hague Conference<sup>237</sup> and helped set the stage for United States participation.<sup>238</sup>

At the October, 1964 Hague Conference on Private International Law,<sup>239</sup> delegates from the United States and

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The relevant sections of title 18 that were amended are §§ 1696 and 1781. 28 U.S.C. §§ 1696, 1781 (1982).

<sup>234</sup> 28 U.S.C. § 1696 (1982).

<sup>235</sup> 28 U.S.C. § 1781 (1982).

<sup>236</sup> *Sectional Analysis of Public Law 88-619, Senate Committee on the Judiciary, S. REP. 1580, 88th Cong., 2d Sess. (1964), reprinted in 6 INT'L LEGAL MAT. 1086 (1964).*

<sup>237</sup> See Peter Pfund, *International Unification of Private Law: A Report on United States Participation, 1985-86*, 20 INT'L LAW 623 (1986) (describing the Hague Conference as an international forum for representatives of different nations to discuss and propose multilateral accords for the unification and harmonization of private law).

<sup>238</sup> *Id.*

<sup>239</sup> Patricia N. McCausland, *How May I Serve You? Service Of Process By Mail Under The Hague Convention On The Service Abroad Of Judicial And Extrajudicial Documents In Civil Or Commercial Matters*, 12 PACE L. REV. 177, 178-79 (1992).

The Convention was adopted at the 10th session of the Hague Conference on Private International Law (the "Conference"), an association of independent

twenty-two other nations developed the Hague Service Convention.<sup>240</sup> The Convention revised earlier Hague Conventions on Civil Procedure.<sup>241</sup> "The revision was intended to provide a simpler way to serve process abroad, to assure that defendants sued in foreign jurisdictions would receive actual and timely notice of suit, and to facilitate proof of service abroad."<sup>242</sup>

The delegation's report applauded the Convention as making substantial changes in the practices of many of the civil law countries, moving their practices in the direction of the U.S. approach to international judicial assistance and our concepts of due process in the service of process. The delegation's chief negotiator emphasized that "the convention sets up the minimum standards of international judicial assistance which each country

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nations whose primary objective is the unification of conflict of laws rules. Located in the Netherlands, the Conference is staffed by a permanent bureau that operates under the supervision of a standing commission of the Netherlands government. The bureau and commission work together on the agenda for the quadrennial sessions and handle various administrative matters including the preparation of questionnaires to member nations on forthcoming topics. Special commissions made up of representatives of the member nations convene between sessions to prepare drafts of proposed conventions. These drafts are forwarded to all member nations for their observations. Responses to the drafts are then distributed at the sessions of the Conference. For each session, member nations send representatives from their countries including judges, legal scholars, legal advisers and experts on conflicts of laws.

*Id.*

<sup>240</sup> Leonard A. Leo, *The Interplay Between Domestic Rules Permitting Service Abroad By Mail And The Hague Convention On Service: Proposing an Amendment to the Federal Rules of Civil Procedure*, 22 CORNELL INT'L L.J. 335, 340 (1989).

<sup>241</sup> *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988) (these were the Hague Conventions on Civil Procedure of 1905 and 1954).

<sup>242</sup> *Id.*

which ratifies the convention must offer to all others who ratify." The repeated references to "due process" were not . . . intended to suggest that every contracting nation submitted itself to the intricacies of our constitutional jurisprudence. Rather, they were shorthand formulations of the requirement, common to both due process and the Convention, that process directed on a party abroad should be designed so that the documents "reach the addressee in due time."<sup>243</sup>

## 2. Service of Process Under the Hague Service Convention-

The Hague Service Convention provides transnational litigants with a variety of acceptable methods of service of process.<sup>244</sup>

"The primary innovation of the Convention" is the development of a Central Authority for service of process.<sup>245</sup> Although the Hague Service Convention permits other methods of service, a plaintiff may always resort to use of the Central Authority method "if another method . . . should fail."<sup>246</sup> In effect, the Central Authority method is a "safety valve."<sup>247</sup>

a. *The Central Authority*--The Hague Service Convention requires each contracting state to establish a Central Authority to receive requests<sup>248</sup> from other contracting

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<sup>243</sup> *Id.* at 713-14 (citations omitted)

<sup>244</sup> Hague Service Convention, *supra* note 23, at arts. 5, 8, 9, 10, 11, 19.

<sup>245</sup> *Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 698.

<sup>246</sup> Gary A. Magnarini, *Service of Process Abroad Under the Hague Convention*, 71 MARQ. L. REV. 649, 670 (1988).

<sup>247</sup> Robert M. Hamilton, Note, *An Interpretation of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents Concerning Personal Service in Japan*, 6 LOY. L.A. INT'L & COMP. L.J. 143, 148 (1983).

<sup>248</sup> Requests are submitted on a form USM-94. See STATE DEP'T GUIDE, HAGUE CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRA-JUDICIAL DOCUMENTS IN

states for service of documents.<sup>249</sup> The authority or judicial officer competent under the law of the state<sup>250</sup> in which the documents originate<sup>251</sup> submits the request,<sup>252</sup> along with the documents to be served.<sup>253</sup> The authority or officer submitting the request must ensure compliance with the language

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CIVIL AND COMMERCIAL MATTERS, 3 (undated) [hereinafter DOS GUIDE]. Within the United States, the form is available at the office of any United States Marshal. Further information on the treaty may be obtained from the Supervisory Deputy for process at the nearest U.S. Marshal's Office, or by contacting Headquarters, U.S. Marshal's Service, (202) 307-9054. *Id.*

<sup>249</sup> Hague Service Convention, *supra* note 23, at art. 2; *See also Volkswagenwerk Aktiengesellschaft*, 486 U.S. at 698.

<sup>250</sup> DOS GUIDE, *supra* note 247, at 3, 4. This guide provides that:

Effective February 26, 1983, Public Law 97-462 amended Rule 4 of the FRCP regarding service of process. Pursuant to this change in Rule 4(c)2(A) the U.S. Marshal will no longer transmit Form USM-94 directly to the foreign central authority of a country party to the Hague Service Convention. Rather, the attorney representing the party seeking service should execute the portion of Form USM-94 marked "Identity and Address of the Applicant" and the "Name and Address of the Requesting Authority" portion of the Summary of the Document to be Served. A reference to the statutory authority to serve the document should appear prominently on the request, stating that "service is requested pursuant to Rule 4(c)2(A), U.S. Federal Rules of Civil Procedure" which authorizes any person who is not a party and is not less than 18 years of age to serve a summons and complaint.

*Id.*

<sup>251</sup> *See* Magnarini, *supra* note 245, at 670. "Under the laws of the various signatories, the range of persons authorized to forward service requests is very broad, through [sic] 'private persons' are specifically excluded from this right." *Id.* (citing the HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRACTICAL HANDBOOK ON THE OPERATION OF THE HAGUE CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS 3 (1983)).

<sup>252</sup> Hague Service Convention, *supra* note 23, art. 3 (requires that the request conform to the model annexed to the Convention).

<sup>253</sup> *Id.* (requires that the request and documents to be served must be submitted in duplicate; however, art. 20 provides that contracting states may agree amongst themselves to waive the requirement for duplicate copies of transmitted documents).

requirements of the Hague Service Convention regarding the request<sup>254</sup> and the documents to be served.<sup>255</sup>

The Central Authority of the receiving state reviews the request for compliance with the Hague Service Convention.<sup>256</sup> If the request does not comply, the Central Authority promptly notifies the requester and specifies its objection.<sup>257</sup> If the request complies with the Hague Service Convention, the Central Authority serves the document, or arranges for service by an appropriate agency.<sup>258</sup> The Central Authority may serve the documents by either a method prescribed by its internal law for domestic actions, or by a particular method requested by the applicant,<sup>259</sup> unless such a method is incompatible with

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<sup>254</sup> *Id.* art. 7. This article provides that:

“[T]he standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate. The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.”

*Id.*

<sup>255</sup> *Id.* art. 5 (states that “the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.”).

<sup>256</sup> *Id.* art. 4.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* art. 5.

<sup>259</sup> *Id.* art. 12. (Normally, the contracting state asked to serve the process may not seek payment or reimbursement of taxes or costs for the services rendered; however, the applicant shall pay or reimburse the costs occasioned by the employment of a judicial officer or of a person competent under the law of the State of destination, or for the use of a particular method of service.).



the law of the Central Authority.<sup>260</sup> If an applicant does not request a specific method of service, the Central Authority may serve process by delivery to an addressee who voluntarily accepts it.<sup>261</sup> This method is known as "remise simple."<sup>262</sup> "[It] is by far the most broadly used approach in a substantial number of Contracting States."<sup>263</sup>

After serving process,<sup>264</sup> the Central Authority<sup>265</sup> completes a certificate in the form of the model annexed to the Hague Service Convention and forwards it directly to the applicant.<sup>266</sup> The certificate verifies service of the document and includes the method, the place and date of service, and the name of the person served.<sup>267</sup> If service did not occur, the certificate sets out the reasons that prevented service.<sup>268</sup>

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See *The Report on the Work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 17 INT'L LEGAL MATERIALS 319, 327-328 (1978) [hereinafter *Permanent Bureau Report*].

<sup>263</sup> DOS GUIDE, *supra* note 247, at 4 (The person who delivers the document is often a police official. In most cases, the addressees accept the document voluntarily or pick it up at the police station.)

<sup>264</sup> See *id.* at 5 (There is no specific time frame for service provided for in the Convention. However, the Hague Conference on Private International Law advises that most Convention central authorities generally accomplish service within two months.).

<sup>265</sup> Hague Service Convention, *supra* note 23, at art. 6 (providing that any authority so designated by the Central Authority may complete the certificate).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

*b. Methods of Service Other than the Central*

*Authority--*The Hague Service Convention permits other methods of service abroad in addition to the Central Authority. These methods include:

(1) service directly through diplomatic or consular agents, provided the receiving state does not object - although objections shall not apply to service upon a national of the state in which the documents originate;<sup>269</sup>

(2) service through consular channels (or diplomatic channels in exceptional circumstances) by forwarding documents to those authorities of another contracting state designated by the latter for this purpose;<sup>270</sup>

(3) service by postal channels, provided the receiving state does not object;<sup>271</sup>

(4) the freedom of judicial officers, officials, other competent persons, or any person interested in the litigation to effect service of process through the judicial officers, officials or other competent persons of the receiving state, provided the receiving state does not object;<sup>272</sup> and

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<sup>269</sup> *Id.* art. 8.

<sup>270</sup> *Id.* art. 9.

<sup>271</sup> *Id.* art. 10.

<sup>272</sup> *Id.*

(5) service by mutually acceptable means pursuant to agreement between the sending and receiving state.<sup>273</sup>

*c. Default Judgments*--The Hague Service Convention also provides rules for default judgments that are essentially in accordance with American standards of due process. Under the Hague Service Convention, when a defendant has not appeared pursuant to a legal action, judgment shall not be given without proof that (1) the document was served by a method prescribed by the internal law of the receiving state; or (2) the document was actually delivered to the defendant or his or her place of residence by a method authorized by the Hague Service Convention.<sup>274</sup>

These provisions help ensure timely notice by otherwise voiding a default judgment.<sup>275</sup> However, they do not solve the problem of whether the method of service chosen under the internal law of the receiving state comports with American due process standards.

Notwithstanding the above rules on defaults, the Hague Service Convention authorizes a judgment in the absence of a certificate of service, under the following conditions:

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<sup>273</sup> *Id.* art. 11.

<sup>274</sup> *Id.* art. 16.

<sup>275</sup> See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 708 (1988) (Brennan, Marshall & Blackmun, JJ., concurring) (noting that one of the primary goals of the Hague Service Convention was ensuring that defendants receive timely notice of an action).

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document, [and]

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.<sup>276</sup>

If a court grants a default judgment, the defendant may apply to have it reopened. This may occur after expiration of the time to appeal if the defendant, without fault, did not have knowledge of the document in sufficient time to defend or appeal.<sup>277</sup> At the time of application, the defendant must demonstrate a prima facie defense to the action on the merits.<sup>278</sup> At a minimum, defendants may file such applications for up to one year after the date of the judgment.<sup>279</sup>

3. *United States Interpretation of the Hague Service Convention*--"Reading and applying the provisions of the

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<sup>276</sup> *Id.* (Notwithstanding the provisions cited, the judge may order, in case of urgency, any provisional or protective measures).

<sup>277</sup> Hague Service Convention, *supra* note 23, at art. 16.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* (under the Convention, each contracting State may declare the time period for filing of the application, provided it is not less than one year).

Convention may at first blush seem easy."<sup>280</sup> However, litigants have required courts within the United States to interpret the Hague Service Convention on several occasions.<sup>281</sup> The following highlights relevant areas of interpretation.

a. *Status of the Hague Service Convention*--Within the United States, the Hague Service Convention holds the status of a treaty.<sup>282</sup> Under the Supremacy Clause of the United States Constitution, courts have found that the Hague Service Convention "shall apply in all cases, civil or commercial"<sup>283</sup> matters, where there is occasion to transmit a judicial or extrajudicial<sup>284</sup> document for service abroad."<sup>285</sup>

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<sup>280</sup> Magnarini, *supra* note 245, at 651.

<sup>281</sup> *Id.* See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988); Lemme v. Wine of Japan Import, 631 F. Supp. 456 (E.D.N.Y. 1986); Vorhees v. Fischer & Krecke, 697 F.2d 574 (4th Cir. 1983); Kadota v. Hosogai, 608 P.2d 68 (Ariz. App. 1980).

<sup>282</sup> Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 698 (1988).

<sup>283</sup> See *Report of the U.S. Delegation to the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 17 INT'L LEGAL MATERIALS 312, 315-16 (1978) [hereinafter *U.S. Delegation Report*]. This report states that even the term "civil and commercial matters" lacks agreement. The United States interprets this term to include all matters, except criminal actions. The French and Swiss practice is to exclude fiscal and criminal matters. The Japanese practice excludes all administrative matters. The German practice is to exclude all criminal matters and those involving the enforcement of public law (as distinguished from private law). Finally, the Egyptian practice excludes family law. *Id.*

<sup>284</sup> See *Permanent Bureau Report*, *supra* note 261, at 327-28.

Extrajudicial documents differ from judicial documents in that they are not directly connected with lawsuits, and they are distinguished from purely private acts by the fact that they require the intervention of an "authority" or of a "judicial officer" under the terms of the Convention. Examples given were demands for payment, notices to quit in connection with leaseholds, and protests in connection with bills of exchange, but all on [t]he condition that they emanate from an authority or from a process server.

As an exception, the "Convention shall not apply where the address of the person to be served with the document is not known."<sup>286</sup> Also, the Supreme Court has held that the Hague Service Convention does not apply when there is service on a domestic agent that is valid and complete under both state law and the Due Process Clause.<sup>287</sup>

While the Hague Service Convention provides a means to serve process abroad:

[It] is not a long-arm device which provides independent authorization for service of process abroad . . . [T]he Convention, like Federal Rule 4, offers appropriate methods for serving process only when a state long-arm rule or other federal statute authorizes service abroad. A basis for jurisdiction over the foreign defendant must always be established independent of the Convention. The purpose of the Convention is to provide a mechanism to effectuate notice, not to regulate amenability.<sup>288</sup>

*b. Service by Mail*--American courts have also concerned themselves with whether the provisions of Article 10a of the Hague Service Convention permit service abroad by

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*Id.* Note, some countries permit the service of such documents by private persons rather than by an authority or judicial officer; accordingly, the Special Commission encouraged the Central Authorities of signatory countries to serve documents that would otherwise require the intervention of an authority or judicial officer in their country. *Id.*

<sup>285</sup> Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988).

<sup>286</sup> See *id.*

<sup>287</sup> *Id.* at 707 (the domestic agent was a subsidiary of the defendant in the United States).

<sup>288</sup> Magnarini, *supra* note 245, 665 (citing the *DeJames* case at 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981)).

mail.<sup>289</sup> The issue centers on the language contained in Article 10a stating that, in the absence of an objection by the receiving state,<sup>290</sup> the sending state shall be free to "send judicial documents, by postal channels, directly to persons abroad."<sup>291</sup> There is a split of authority within U.S. courts and amongst legal commentators on whether such language permits actual service by mail or simply the forwarding of legal documents for informational purposes after successful service under other authorized provisions of the Hague Service Convention.<sup>292</sup> The primary thrust of the division centers on

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<sup>289</sup> For example, courts holding that the Convention permits service by mail include *Ackerman v. Levine*, 788 F.2d 830 (2d Cir. 1986); *Smith v. Dainichi Kinzoku Co.* 680 F. Supp. 847 (W.D. Tex. 1988); *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456 (E.D.N.Y. 1986). Courts holding that the Convention does not permit service by mail include *Bankston v. Toyota Motor Corporation*, 889 F.2d 172 (8th Cir. 1989); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Crysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984).

<sup>290</sup> See DOS GUIDE, *supra* note 247, at 1 (stating that at the current time, only China, the Czech Republic, the Slovak Republic, Egypt, the Federal Republic of Germany, Norway, Luxembourg and Turkey have notified the Hague Conference on Private International Law on accession, ratification or subsequently that they object to service in accordance with Article 10a of the Convention, via postal channels).

<sup>291</sup> Hague Service Convention, *supra* note 23, at art. 10a.

<sup>292</sup> See *Ackerman v. Levine*, 788 F.2d 830 (2d Cir. 1986); *Smith v. Dainichi Kinzoku Co.* 680 F. Supp. 847 (W.D. Tex. 1988); *Lemme v. Wine of Japan Import, Inc.* 631 F. Supp. 456 (E.D.N.Y. 1986) (holding that the Hague Service Convention permits service by mail); *but see Bankston v. Toyota Motor Corporation*, 889 F.2d 172 (8th Cir. 1989); *Pochop v. Toyota Motor Co.*, 111 F.R.D. 464 (S.D. Miss. 1986); *Zisman v. Sieger*, 106 F.R.D. 194 (N.D. Ill. 1985); *Crysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182 (D.D.C. 1984) (holding that the Hague Service Convention does not permit service by mail. Also, for analysis by legal commentators, see BORN & WESTIN, *supra* note 134, at 155-60 (framing the issues and suggesting that the better practice for U.S. litigants is to consult the actual reservations of member states before using an alternative means rather than the Central Authority); RISTAU, *supra* note 192 (who is considered one of the leading commentators on the Convention and strongly contends that the draftsmen of the Convention intended the word "send" to encompass service of process rather than mere mailing of documents for informational purposes following an authorized method of service); Leo, *supra* note 239

the use of the word "send" in article 10a rather than "effect service" as found in articles 10b and 10c.<sup>293</sup>

Courts have employed divergent analytical frameworks for resolving this issue. Courts upholding service of process by mail look to the negotiating history and purpose of the Hague Service Convention for guidance. For instance, in *Ackerman v. Levine*,<sup>294</sup> the court looked to the history of the Hague Service Convention and found that the drafters carelessly chose the word "send" while intending to permit mail service.<sup>295</sup> The court also found that a literal interpretation of the Hague Service Convention would defeat its purpose of providing unifying rules permitting judicial assistance.<sup>296</sup> Courts finding to the contrary have relied more heavily on methods of statutory construction.<sup>297</sup> These courts have determined that it would be inconceivable for the drafters to have been so careless based on the deliberations normally attending treaty negotiations.<sup>298</sup> Furthermore, permitting service by mail would

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(supporting an interpretation that article 10a permits service by mail provided the receiving state has not filed a formal objection to this provision of the Hague Convention); *but see* L. Andrew Cooper, *International Service Of Process By Mail Under The Hague Service Convention*, 13 MICH. J. INT'L 698 (1992) (arguing that article 10a does not authorize service by mail); McCausland, *supra* note 238 (also arguing that article 10a does not authorize service by mail).

<sup>293</sup> See, e.g., BORN & WESTIN, *supra* note 134, at 159; RISTAU, *supra* note 193, at 149 (or 4-28, n. 32); Leo, *supra* note 239, 342; McCausland, *supra* note 238, at 197.

<sup>294</sup> *Ackerman v. Levine*, 610 F. Supp. 633 (S.D.N.Y. 1985).

<sup>295</sup> *Id.* (citation omitted)

<sup>296</sup> *Id.*

<sup>297</sup> See *Bankston v. Toyota*, 123 F.R.D. 595, 599 (W.D. Ark. 1989).

<sup>298</sup> *Id.*



basically circumvent the major innovation of the Hague Service Convention, the Central Authority, and make the vast bulk of the Hague Service Convention meaningless.<sup>299</sup>

Both arguments appear meritorious. However, neither argument considered the reports of the two Special Commissions<sup>300</sup> that met to review the operation of the Hague Service Convention since its enactment.<sup>301</sup> The First Special Commission, in that portion of their report commenting on service by postal channels, found that:

The States which object to the utilization [sic] of service by post sent from abroad are known thanks to the declarations made to the Ministry of Foreign Affairs.<sup>302</sup>

. . . . .  
It was determined that most of the States made no objection to the service of judicial documents coming from abroad directly by mail in their territory.<sup>303</sup>

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<sup>299</sup> Ackerman v. Levine, 889 F.2d 172, 190-91 (2d Cir. 1986).

<sup>300</sup> *Report on the work of the Special Commission on the Operation of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, 17 INT'L LEGAL MATERIALS 319 (1978) [hereinafter *First Special Commission Report*]; *Report on the Work of the Special Commission of April 1989 on the Operation of the Hague Conventions of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents or Commercial Matters and of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, 28 INT'L LEGAL MATERIALS 1558 (1989) [hereinafter *Second Commission Report*].

<sup>301</sup> McCausland, *supra* note 238, at 197.

<sup>302</sup> *First Special Commission Report*, *supra* note 299, at 329.

<sup>303</sup> *Id.* at 326.

The Second Special Commission, in responding to questions concerning interpretations of article 10a, stated that:

Article 10 a [sic] in effect offered a reservation to Contracting States to consider that service by mail was an infringement of their sovereignty. Thus, theoretical doubts about the legal nature of the procedure were unjustified. Nonetheless, certain courts in the United States of America in opinions cited in the "Checklist" had concluded that service of process abroad by mail was not permitted under the Convention.<sup>304</sup>

These statements add great weight to the rationale employed by the Second Circuit in *Ackerman*. While they are not dispositive, courts should consider them when interpreting article 10a. However, in the absence of clear judicial interpretation, American litigants should carefully assess the decisions of the jurisdiction they are in prior to using service by mail in a foreign country that is a signatory to the Hague Service Convention.<sup>305</sup> Also, the litigant must consider whether the foreign country has filed a formal objection to article 10a of the Hague Service Convention<sup>306</sup> and whether the internal laws of the receiving country permit service by mail.<sup>307</sup>

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<sup>304</sup> *Second Special Commission Report*, *supra* note 299, at 1561.

<sup>305</sup> The litigant also needs to keep in mind whether or not the foreign country has objected to such service, and whether that country permits service by mail under its internal laws.

<sup>306</sup> See *Bankston v. Toyota*, 123 F.R.D. 595, 599 (W.D. Ark. 1989) (prohibiting such service under these circumstances).

<sup>307</sup> See *Lemme v. Wine of Japan Import, Inc.*, 631 F. Supp. 456 (E.D.N.Y. 1986) (holding that service of process was valid because Japanese law permitted it). Note, the court

4. *Independent State Agreements*--The United States has not signed any international agreement on child support enforcement.<sup>308</sup> Without such an agreement, states have entered into agreements with foreign nations on their own.<sup>309</sup> States have been able to enter into these "Parallel Unilateral Policy Declarations"<sup>310</sup> based on principles of comity<sup>311</sup> and without violating the Compact Clause.<sup>312</sup> These agreements generally

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did not consider the special nature of mail service in Japan. Japan, like other civil law countries, regards service of process as a sovereign act that requires service through government officials. See Robert W. Peterson, *Jurisdiction and the Japanese Defendant*, 25 SANTA CLARA L. REV., 555, 577 (1985) ("The court clerk stamps the outside of the envelope with a notice of special service ('tokubetsu sootatsu'). The mail-carrier acts as a special officer of the court by recording the proof of delivery on a special proof of service form and returning it to the court clerk.") This may have impacted on the court's decision. Note, if Japan is unsatisfied with American judicial decisions, Japan is always free to exercise its right to formally object to service of process by mail under article 10a (they have already done so regarding articles 10(b) and (c)). *Id.* See also Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Support Enforcement*, 28 FAM. L. Q. 90, 105 (1994) (stating that service by mail is unknown in most of Latin America).

<sup>308</sup> See DeHart, *supra* note 306, at 89. See, e.g., The New York Convention, 268 U.N.T.S. 32 (1957); Conventions established under The Hague Conference on Private International Law: Convention sur la loi applicable aux obligations alimentaires envers les enfants (1956) (1956 Applicable Law Convention), 510 U.N.T.S. 163 (1956); Convention concernant la reconnaissance et l'exécution des décisions en matière d'obligations alimentaires envers les enfants (1958) (1958 Recognition and Enforcement Convention), 539 U.N.T.S. 29; Conventions on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973) and on the Law Applicable to Maintenance Obligations (1973), 1021 U.N.T.S. 209 (1973).*Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* (noting that this is the term of art given such agreements by the Department of State).

<sup>311</sup> See *Hilton v. Guyot*, 159 U.S. 113 (1895).

<sup>312</sup> See U.S. CONST. art. I, § 10, cl. 2, cl. 3. "The United States Constitution prohibits absolutely any state from entering 'into any treaty, alliance, or confederation' and requires the consent of Congress to 'enter into any agreement or compact with another state, or with a foreign power.'" DeHart, *supra* note 306, at 91.

provide for enforcement of child support obligations based on the Revised Uniform Reciprocal Enforcement of Support Act (RURESA).<sup>313</sup>

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Congressional consent is not required for interstate agreements that fall outside the scope of the Compact Clause. Where an agreement is not "directed to the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States," it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.

*Id.* (citing *Cuyler v. Adams*, 449 U.S. 433, 440 (1981)).

<sup>313</sup> *Id.* at 90 (the Uniform Reciprocal Enforcement of Support Act (URESA) is found at 9 B.U.L.A. 381 (1968)).

The Uniform Reciprocal Enforcement of Support Act (URESA) was first developed in 1950. . . and was revised significantly in 1968 (RURESA). In August 1992, an almost wholly new Act was completed to replace URESA/RURESA and was renamed the Uniform Interstate Family Support Act (UIFSA) [9 U.L.A. 15(Supp. 1993)]. Because the application of the new Act to international cases remains the same, the arrangements made and discussed below under RURESA are equally applicable to UIFSA.

The procedures set out in URESA were developed by the states to solve the persistent and growing problems of obtaining support for children and spouses when the separated or divorced parents or spouses live in different states. The Act provides for a two-state lawsuit where an action is filed by the obligee in one state (the initiating state) and sent to the state where the obligor or his or her assets are located (the responding state). An appropriate court in the latter state establishes jurisdiction over the obligor, and may enter an order of support payable to the obligee in the initiating state. The Act establishes the requirements of the petition, the procedures to be followed, and the duties of both initiating and responding states. The cases are handled by a designated public agency which provides services to the petitioner. No costs or fees are charged, but the obligor may be ordered to pay fees, costs, and expenses. In addition to these procedures for establishing and enforcing an order . . . the act, sets out a procedure for registering an existing order which then becomes enforceable in the state where the obligor resides. . . .

The 1968 RURESA expanded the definition of responding state to include "any foreign jurisdiction in which this or a substantially similar reciprocal law is in effect." (citations omitted)

*Id.* at 92, 93.

States have entered into such agreements with Canada, the United Kingdom, Germany, France, and several other foreign nations.<sup>314</sup> Under these agreements:

(1) the country will enforce the child support obligation, collect the money, and send it to the requesting state, whether or not there is an existing order; (2) the order will be enforced if recognizable under the laws and procedures of the country, and if it is not recognized or no order exists, an order or its equivalent will be obtained; (3) the system will deal with both in and out of wedlock children, and a determination of paternity will be made if possible in the circumstances; (4) each country will use its own laws and procedures; and (5) there will be no means test for legal services, and no charge for legal assistance or the services of government offices or personnel.<sup>315</sup>

While these agreements do not affect methods of service of process under the Hague Service Convention,<sup>316</sup> they reflect the great interest that foreign nations and individual states within the U.S. have in child support enforcement matters. This cooperative effort between foreign nations and individual states demonstrates the feasibility of the U.S. Department of State developing mutually acceptable methods of service under the Hague Service Convention for improving service of process

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<sup>314</sup> *Id.* at 94-97.

<sup>315</sup> *Id.* at 99-100.

<sup>316</sup> *See generally* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988) (holding that the Hague Service Convention, as a treaty, is the supreme law of the land and must be followed by State courts).

in child support enforcement matters.<sup>317</sup> There should be *de minimus* concern by Foreign nations over methods of service that do not involve their resources or citizens (for example, letting federal agencies serve process related to child support through employment channels on U.S. nationals employed by the agency overseas).

#### VI. Part V: DoD response Executive Order 12953

This part begins briefly with an overview of DoD's immediate reaction to the Executive Order. Then, in detail, it analyzes both the DoD findings and recommendations for improving service of process as well as those jointly developed by OPM and HHS.

##### A. DoD Reaction

The Department of Defense swiftly engaged in a serious effort to meet the mandates of the Executive Order.<sup>318</sup> DoD established interagency relationships<sup>319</sup> and work commenced immediately on the tasks required by the Executive Order.<sup>320</sup>

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<sup>317</sup> See Hague Service Convention, *supra* note 23, at art. 11 (permitting mutually acceptable methods of service of process).

<sup>318</sup> See DEP'T OF DEFENSE REPORT, SUMMARY OF DOD ACTIONS TO COMPLY WITH EXECUTIVE ORDER 12,953 (5 June 1995).

<sup>319</sup> See DOD REPORT, *supra* note 103, part II (The day following the Executive Order, the Under Secretary of Defense for Personnel and Readiness met with the Assistant Secretary For Children and Families, HHS, to discuss child support enforcement and Executive Order 12,953).

<sup>320</sup> *Id.*

The Task Force operated under the guidance of four policy commitments established at its first meeting.<sup>321</sup> These commitments provided for:

1. Streamlining policies and procedures by removing barriers hindering adequate and timely child support while remaining sensitive to the impact on the Agency;

2. Roughly equal treatment between uniformed members and federal civilian employees;

3. Ensuring due process protection for members of the Uniformed Services; and

4. Enabling the agency to become a model employer.<sup>322</sup>

As part of the Task Force effort, each Service reviewed its policies on service of process.<sup>323</sup> The Task Force

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<sup>321</sup> DoD Task Force Meeting on Child Support Enforcement, Agenda, 31 Mar. 1995, Pentagon, Washington, D.C. [hereinafter Agenda] (author attended the meeting that was chaired by the Deputy Under Secretary of Defense for Requirements and Resources, Ms. Jeanne B. Fites)

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* (Enclosure three to the Agenda provided a format for military service reports to the task force. Part I3 of this format asked for a review of compliance with court orders and service of process, including a discussion of methods of assistance and perceived problems with overseas assistance).

considered these reviews prior to submission of the DoD 180-Day Report to OMB.<sup>324</sup>

### *B. The 180-Day Reports*

In accordance with the President's Executive Order,<sup>325</sup> DoD reported to OMB its findings and recommendations for improving child support enforcement.<sup>326</sup> OPM and HHS also submitted their report to OMB (hereinafter "other agency report").<sup>327</sup> Both reports included findings and recommendations on service of process.<sup>328</sup> Together, the reports identified seven issues that adversely affect child support enforcement.<sup>329</sup> Only three issues were common to each report: appointment of designated agents for receipt of service of process; use of certified mail to serve process overseas; and lack of knowledge by practitioners.<sup>330</sup> The following analyzes all issues.

1. *Designated Agent*--The Executive Order directed the study of federal agencies designating an agent for service of

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<sup>324</sup> See *infra* Part VI.B.1.

<sup>325</sup> Exec. Order No. 12,953, *supra* note 8, at § 401.

<sup>326</sup> DoD REPORT, *supra* note 103.

<sup>327</sup> OFFICE OF PERSONNEL MANAGEMENT AND DEPARTMENT OF HEALTH AND HUMAN SERVICES REPORT, RECOMMENDATIONS FOR IMPROVING CHILD SUPPORT ENFORCEMENT IN THE FEDERAL WORKPLACE 9, part 4 (1995) [hereinafter, Other Agency Report];

<sup>328</sup> DoD REPORT, *supra* note 103, at 4-7; and Other Agency Report, *supra* note 326, at 9-11.

<sup>329</sup> DoD REPORT, *supra* note 103, at 4-7; and Other Agency Report, *supra* note 326, at 9-11.

<sup>330</sup> DoD REPORT, *supra* note 103, at 4-7; and OPM and Other Agency Report, *supra* note 326, at 9-11.



process that would have the same effect and bind employees to the same extent as actual service of process on the employees.<sup>331</sup> Neither the DoD Report nor the other agency report favored this approach.<sup>332</sup> The reports raised potential due process concerns regarding employees receiving actual or delayed notice.<sup>333</sup> They also expressed misgivings over agency liability.<sup>334</sup> For instance, the DoD Report questioned whether state courts could subject federal agencies to their judicial process when an employee or member failed to appear in court.<sup>335</sup> The other agency report also stated that it is not clear if the designated agent would be an agent of the court in which litigation is pending, an agent of the federal government, or an agent of one or both parties to the litigation.<sup>336</sup> The other agency report also expressed concern about whether state civil procedure statutes and court rules would need amendment to obtain jurisdiction under the designated agent approach.<sup>337</sup>

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<sup>331</sup> Exec. Order No. 12,953, *supra* note 8, at § 402(a)(iv).

<sup>332</sup> DoD REPORT, *supra* note 103, at 5, 6 (stating, for example, that a member may never get actual notice if discharged before the service of process reaches him or her; or the notice may be delayed during time of war, national emergency, other military exigencies).

<sup>333</sup> *Id.* (showing, for example, that a member may never get actual notice if discharged before the service of process reaches him or her; or the notice may be delayed during time of war, national emergency, or other military exigencies).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Other Agency Report, *supra* note 326, at 9.

<sup>337</sup> *Id.*

a. *Recommendation*--Neither report recommended adopting designated agency. After coordination with OPM and HHS, the DoD Report concluded that the proposal appeared unworkable.<sup>338</sup> The other agency report, while not advocating the use of a designated agent, recommended that any proposal mandating the use of designated agents should include provisions for protection of civilian employees (e.g., postponement rights, right to open a default judgment) similar to those afforded military members under the Soldiers' and Sailors' Civil Relief Act,<sup>339</sup> as well as protections for federal agencies from liability.<sup>340</sup> Neither report provided any legal authority for its positions.

b. *Analysis*--Examination of the designated agent approach must include consideration of practical benefits and legal constraints. Pragmatically, this proposal would significantly simplify the procedures for service of process. Service on designated agents within the United States would negate requirements to comply with foreign law or international agreements.<sup>341</sup> The proposal also reduces the required knowledge base for practitioners by creating fewer, more readily identifiable targets for service of process.<sup>342</sup>

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<sup>338</sup> DoD REPORT, *supra* note 103, at 6.

<sup>339</sup> SSCRA, 50 USC app. §§ 501-596 (1988, as amended in 1991).

<sup>340</sup> Other Agency Report, *supra* note 326, at 10.

<sup>341</sup> See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988).

<sup>342</sup> For example, whenever a child support enforcement action involved a military member, rather than having to track down the member, the process server merely needs to serve process on the DoD designated agent. Thus, if someone needed to serve process on

The proposal would save child support enforcement (CSE) caseworkers and other practitioners (for example, lawyers and process servers) a tremendous amount of time, energy and expense associated with locating deadbeat parents and effectuating legally binding service of process on them in a foreign country.

In the absence of any cost studies, it is reasonable to assume that the savings to the nation resulting from more efficient child support enforcement would outweigh any expense caused to federal agencies by having to set up procedures for the designated agent to receive the process and ensure delivery to the intended recipient. This is especially true within the military services because many commanders already receive requests for service of process and act as conduits for that service when the member voluntarily agrees to accept it. Furthermore, regardless of whether the member agrees to accept it, the commander will have to take some action; either to arrange a location for service of process or to return the process to the requesting party.

Both reports identified legal concerns with due process, agency liability, and the need for states to amend their

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100 different military members located overseas, they could send all 100 summons and complaints to the same DoD designated agent in one envelop. The address for the designated agent would likely be obtainable from the Federal Register or by making a telephone call to DoD (while it may require a few telephone calls, it would be quicker and less expensive than tracking down all 100 members overseas).

service of process rules. However, the reports did not contain supporting legal analysis. This paper addresses the due process issue. The other two issues are not analyzed because they are matters of policy and procedure.<sup>343</sup> For instance, legislative drafters could, as a matter of policy, craft legislation ensuring that federal agencies are immune from liability for their role as a designated agent for service of process.<sup>344</sup>

The fundamental question is whether service on the federal government, as an agent for an individual in a civil matter unrelated to official agency functions, comports with the Due Process Clause of the United States Constitution.<sup>345</sup> As earlier established, due process requires adequate notice to the defendant and the court to have personal jurisdiction over the defendant.<sup>346</sup> Regarding notice, it must be reasonably calculated to apprise the defendant of the pendency of the action and afford an opportunity to present objections.<sup>347</sup>

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<sup>343</sup> The issue of States amending their jurisdictional statutes to take full advantage of their long-arm ability under the U.S. Constitution is a matter of State preference. However, the Federal government may encourage states to change their rules by granting or denying federal benefits to states contingent upon their adoption of specified rules.

<sup>344</sup> See *Federal Dep't. Ins. Corp. v. Myer*, 114 S.Ct. 996 (1994) (providing that absent a waiver, sovereign immunity shields the federal government and its agencies from suit).

<sup>345</sup> The Fifth Amendment of the U.S. Constitution is implicated because appointment of a designated agent would most likely be pursuant to Federal action by either Congressional legislation or Executive Order. The Fourteenth Amendment of the U.S. Constitution must also be considered because States would have to amend their State service of process codes to include service on a designated agent of the Federal government as an acceptable means of service of process that gives the issuing court jurisdiction.

<sup>346</sup> See *infra* part V.A.2.

<sup>347</sup> *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

This paper assumes that the content of the notice, as found in the summons and complaint, are adequate. Also, there should be little concern about the ability of the federal government to pass the legal process in a timely fashion to its civilian employees or military members.<sup>348</sup>

The jurisdictional prong of due process is more complicated as applied to the proposal for designated agents. *International Shoe* and its progeny require minimum contacts with the forum state that do not offend traditional notions of fair play and substantial justice.<sup>349</sup> The proposal in Executive Order 12953 raises concern about satisfying minimum contacts. It is unclear whether the approach permits service by any state, regardless of the state's contacts with the defendant;<sup>350</sup> or whether the approach is subject to the minimum contacts analysis for jurisdiction established in *International Shoe*.<sup>351</sup>

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<sup>348</sup> See generally 5 C.F.R. §§ 581.201-.201 (1995) (service of process for garnishment orders for child support and alimony).

<sup>349</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Shaffer v. Heitner*, 433 U.S. 186 (1977); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408 (1984); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

<sup>350</sup> See S. 689, 103th Cong., 1st Sess. (1994) (§ 201 of this bill would have declared that Congress found that due process is satisfied if state courts exercise personal jurisdiction over a nonresident who is a parent or presumed parent of a resident child in order to establish, enforce, or modify a child support order or to establish parentage - thereby confronting the Due Process Clause as interpreted by the courts).

<sup>351</sup> *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

It is unlikely that the President intends to implement any proposal that violates the Due Process Clause of the United States Constitution. Accordingly, the proposal is suitable only for those cases where the forum state has the required minimum contacts necessary to establish jurisdiction.<sup>352</sup> In those cases where a state served process on a designated agent without having sufficient minimum contacts, and the agent passed the process on to the defendant, the defendant would be able to challenge the service and request that the court quash it on due process grounds.<sup>353</sup>

An additional concern not raised by either report is whether the federal government may be a proper agent of the employee for service of process in a private civil matter. The basic rule is that the person to be served must actually authorize the appointment of the agent for receipt of service of process.<sup>354</sup> The proposal contained in the Order mandates

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<sup>352</sup> See *Kulko v. Superior Court of California*, 436 U.S. 84 (1978). In this case, the defendant and plaintiff were married in California on a brief layover to the defendant's overseas military assignment. They eventually took up residence in New York for many years. Upon their divorce, the plaintiff moved to California. The defendant later consented to his daughter moving to California. The plaintiff brought suit in California for modified support and child support. The Supreme Court ultimately overturned the California award to the plaintiff, finding that the California courts lacked sufficient minimum contacts with the defendant so as to make it unfair for the defendant to appear before California courts over his objection.

<sup>353</sup> *Id.*

<sup>354</sup> See *Ackerman v. Levine*, 610 F. Supp. 633, 644 (S.D.N.Y. 1985) (holding that not even service on defendant's secretary at defendant's place of business was effective when plaintiff's presented no evidence that defendants intended to appoint the secretary to receive service in their behalf.); See also *Lamont v. Haig*, 539 F. Supp. 552, 557 (D.C.S.D. 1982);

appointment of the agent by the federal agency without requiring approval or authorization from the employee. The federal government is without authority to appoint an involuntary agent for service of process on one of its employees in a private litigation matter not involving the federal government.<sup>355</sup> Therefore, in the absence of a specific authorization by the employee, the proposal violates the basic rule on appointment of an agent and should not be implemented.

c. *Alternative(s)*--While both reports are correct in their conclusions that the designated agency approach is not legally sound, the reports should have addressed the underlying intent of the proposal and explored other options. The plain language of the proposal indicates that the drafters intended to preclude defendants from avoiding service of process by guaranteeing a recipient who is always available for service of process and cannot avoid it.

Another approach that meets the intent of the Executive Order is to make federal agencies responsible for appointing officials to assist with actual delivery of service of process. As an employer, the federal government is certainly capable of passing civil process in a timely manner to its

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*Davis-Wilson v. Hilton Hotels Corp.*, 2 Fed. R. Serv. 3d (Callaghan) 6 (E.D. La. 1985). Note, service has also been permitted on domestic subsidiary corporations deemed to be agents of their overseas parent corporation. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

<sup>355</sup> See *id.*

employees. Furthermore, the federal government (for example, DoD) may be the only resource available to serve process on military members while assigned on board a ship or deployed to a remote geographic location.

This alternative approach is not, however, without legal concerns. First, it may not be useable in those foreign countries where internal laws prohibit such service,<sup>356</sup> or in those countries that are signatories to the Hague Service Convention.<sup>357</sup> Also, within DoD, the prohibitions imposed by the Posse Comitatus Act must be considered if the designated agent, or agents thereof, are members of the Armed Forces.<sup>358</sup>

Fortunately, the foregoing legal concerns are not absolute barriers to authorizing full military assistance with delivery of service of process. Most rules regarding international service of process stem from concerns by individual nations about fair treatment of their own citizens by the courts of other countries. Common sense dictates that foreign nations lack interest in domestic U.S. litigation solely involving American plaintiffs and defendants. As earlier noted, foreign nations should not be unduly concerned by service of process within their borders if it is unobtrusive, performed completely within U.S. federal agency

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<sup>356</sup> See BORN & WESTIN, *supra* note 134.

<sup>357</sup> See *infra* part V.C.3. (on Hague Service Convention).

<sup>358</sup> See *infra* part IV.C. (on Posse Comitatus Act).



employment channels, and does not require the use of the resources or citizen's of foreign nations.<sup>359</sup>

As noted above, military policies currently permit military commanders to deliver the process to members in person in those cases where the military member agrees to voluntarily accept service of process. This practice is in accordance with military service policies that require members to pay their just debts and provide financial support for their family members. Additionally, the mechanics associated with providing such assistance already exist within the military services,<sup>360</sup> to include designated "responsible officials" under Executive Order 12953 who could oversee this function.<sup>361</sup> Therefore, if legal barriers are removed, DoD should be amenable to this alternative because it permits the military services to ensure that military members comply fully with military policies.

A modification to this alternative would be using Department of State consular channels to deliver process rather than federal agency officials. Designation of consular channels would overcome legal concerns in those countries that

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<sup>359</sup> Hague Service Convention, *supra* note 23, art. 11 (allowing mutually acceptable methods of service of process).

<sup>360</sup> See, e.g., DEP'T OF DEFENSE INSTRUCTION 1344.12, INDEBTEDNESS PROCESSING PROCEDURES FOR MILITARY PERSONNEL (18 Nov. 1994); 5 C.F.R. §§ 581.201-201 (1995) (both containing elaborate procedures for processing garnishments and debts).

<sup>361</sup> Exec. Order 12,953, *supra* note 8, at § 302.

are signatories to the Hague Service Convention.<sup>362</sup> It is unfortunate for American litigants in child support enforcement actions that internal Department of State policy does not take advantage of its full authority under the Hague Service Convention.<sup>363</sup> Finally, the Posse Comitatus Act prohibitions are not finite. Legislative amendments could authorize military authorities to deliver service of process in child support enforcement actions.<sup>364</sup>

2. *Certified Mail*--The Executive Order also directed review of a proposal to improve service of process for civilian employees and members of the Uniformed Services outside the United States by using certified mail.<sup>365</sup> The DoD Report rejected this proposal.<sup>366</sup> The report found that setting up a separate mailing system for certified mail is potentially expensive and time consuming; ripe for abuse; an invasion of privacy; not available in many foreign countries; and improper in those countries that are signatories to the

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<sup>362</sup> Hague Service Convention, *supra* note 23, art. 8 (permits service through diplomatic and consular channels on one's own nationals over the objection of the receiving state).

<sup>363</sup> 22 C.F.R. § 92.85 (1995).

<sup>364</sup> A legislative change is not required for the Navy and Marine Corps as they were not included in 18 U.S.C. 1385. All that would be required is a change to DEP'T OF DEFENSE DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS, para. C, encl. 4 (15 Jan. 1986), that makes the Posse Comitatus Act applicable to the Navy and Marine Corps. However, for morale reasons, it would not be wise for DoD to unilaterally change DoD policy in the absence of a legislative change applying to the Army and Air Force as well.

<sup>365</sup> Exec. Order 12,953, *supra* note 8, § 401(a)(iv).

<sup>366</sup> DoD REPORT, *supra* note 103, at 6.

Hague Service Convention and have filed objections to service of process by mail.<sup>367</sup>

The other agency report did not completely reject the possibility of improving service of process by using certified mail. Their report determined that State CSE agencies involved in international cases should first attempt service upon an individual through international registered mail where feasible.<sup>368</sup> The Report concurred with the DoD comments that litigants cannot serve process by mail in those countries that are signatories to the Hague Service Convention and have filed appropriate objections.<sup>369</sup> The Report also noted that state

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<sup>367</sup> *Id.* The report stated that:

[T]his process is not feasible because flagging or otherwise distinguishing mailing envelopes or setting up an alternative system for special certified mail return receipt cards for child support cases is a potentially expensive and time-consuming task. It is also one ripe for abuse and misuse and subject to attack as an invasion of privacy. For example, the sender using the special envelope or receipt card for child support matters could disguise non-child support actions to obtain service of process or the sender could use this system to embarrass the recipient in the work place. Furthermore, certified mail is a domestic product only. Restricted mail service is available to many foreign countries, but to be eligible for restricted delivery, the mail must first be registered. Moreover, American courts have consistently held that international mail service of civil summonses is not proper in the case of countries that have entered an appropriate reservation under Article 10 (objections to service via postal channels) of the Hague Service Convention. For these reasons, certified mail is not a viable option for service of process for child support enforcement matters.

*Id.*

<sup>368</sup> *Id.* at 9 (Secondary methods for obtaining service include consular and diplomatic channels, long-arm statutes, and the Hague Service Convention, which the United States and at least 40 other countries have signed)

<sup>369</sup> Other Agency Report, *supra* note 326, at 10.

civil procedure codes and child support statutory provisions might not permit accomplishing service of process by international mail.<sup>370</sup>

a. *Recommendations*--The other agency report recommended that the HHS Office of Child Support Enforcement (OCSE) advocate changes in international conventions and other domestic and international laws to facilitate broader acceptance of service of process by mail in child support enforcement cases.<sup>371</sup> The DoD Report did not provide any recommendations on this issue.

b. *Analysis*--There is a difference of opinion regarding the feasibility of using mail. DoD cites numerous potential problems with such service but does not provide authority to support their conclusions, which appear erroneous as applied to military members overseas. For instance, the United States postal system does not need new mail systems for serving process by certified mail overseas on military members. The current Military Postal System already authorizes such service in countries where the majority of military members are assigned.<sup>372</sup> Additionally, there is no

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<sup>370</sup> *Id.* This is a State choice whether to permit such service as a basis for attaining jurisdiction.

<sup>371</sup> *Id.*

<sup>372</sup> See DEP'T OF DEFENSE DIR. 4525.6-M, DEPARTMENT OF DEFENSE POSTAL MANUAL (Dec. 1989) (consisting of two volumes); UNITED STATES POSTAL SERVICE, ISSUE 49, DOMESTIC MAIL MANUAL UNITED, ch. E, § 010, at E-1 (1995) (providing rules for overseas military mail); UNITED STATES POSTAL SERVICE, ISSUE 16, INTERNATIONAL MAIL

identifiable privacy concern regarding the marking of mail on the outside as a "Child Support Enforcement Matter."<sup>373</sup>

Unlike DoD, the other agency report favors improving service of process by registered mail and advocating changes under existing conventions to permit such service. On this issue, the OPM and HHS approach offers more cooperation than the DoD position.

c. *Alternative(s)*--In addition to supporting the OPM and HHS recommendation, United States postal regulations could be amended to provide for the external marking of mail<sup>374</sup> as a "Child Support Enforcement Matter" or, in the sender block, "From a Child Support Enforcement Agency." This would enable recipients to readily distinguish their mail and

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MANUAL, ch. 3, at 107 (1996) (providing rules for special services, including registered mail); UNITED STATES POSTAL SERVICE, ISSUE 49, DOMESTIC MAIL MANUAL, ch. S, § 912, at S-25 (1995) (providing rules for certified mail).

<sup>373</sup> Note, DoD likely drafted this comment based on a proposal, by the author as a DoD representative to the OPM and HHS working group on service of process issues, that was formally considered and rejected. The proposal called for certified mail marked on the outside as a "Child Support Enforcement Matter." Under the proposal, employees and members would have an affirmative obligation to accept certified mail marked in this manner. This is about as intrusive as an envelope sent certified mail by a tax commissioner that says "Final Notice of Delinquency - State of (any state) Tax Department." Also, this proposal probably formed the basis for the comment about "ripe for abuse" because someone could serve an action in a tort suit under false pretense by sending it certified mail as a "Child Support Enforcement Matter." This concern could be fixed by making it a false statement under 18 U.S.C § 1001 (1994) that carries criminal penalties. The policy concerns for treating child support enforcement matters differently from other types of legal actions justify this distinction.

<sup>374</sup> Either certified, registered or other type of mail that the post office guarantees to deliver.

identify those mail items that relate to child support enforcement. Users of this type of marking should have to certify, under penalty of perjury, that the enclosed material solely relates to a child support enforcement matter.<sup>375</sup> This certification would help protect recipients from accepting mail, under false pretenses, that they otherwise might wish to avoid.

In addition to these changes, all federal agencies could impose an affirmative obligation on their employees or uniformed members to arrange for acceptance of service of process in child support enforcement matters.<sup>376</sup> With these proposals coupled together, this alternative approach would facilitate service of process overseas by enabling employees and uniformed members to recognize certified or registered mail actions that pertain to child support enforcement, and fulfill their obligations to accept them.

This proposal would require action by the Department of State prior to implementation. Specifically, the Department of State would have to work out understandings or agreements with foreign nations, including those that are signatories to the Hague Service Convention and who have objected to service

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<sup>375</sup> See 18 U.S.C. § 1001 (1994).

<sup>376</sup> See *infra* part VI.B.4. (the Department of State approach).

by mail, that permit this type of mail service on our own nationals.<sup>377</sup>

3. *Lack of Knowledge*--Both the DoD Report and the other agency report identified lack of knowledge as a contributor to problems with service of process. The DoD Report claimed that some of the frustration experienced by civilian practitioners (whether lawyers or child support enforcement caseworkers) stems from their unfamiliarity with the military.<sup>378</sup> Also, both reports found that practitioners dealing with international child support enforcement cases often lack the requisite knowledge to overcome efficiently the hurdles associated with service of process overseas.<sup>379</sup>

a. *Recommendations*--OPM and HHS recommended that OCSE develop a comprehensive training and technical assistance strategy for international child support enforcement cases.<sup>380</sup> This would include special emphasis on educating officials in other nations on United States practices on case initiation, administration and judicial processes and service methods.<sup>381</sup> The DoD Report supports this recommendation.<sup>382</sup>

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<sup>377</sup> Hague Service Convention, *supra* note 23, art. 11 (allowing mutually acceptable methods of service of process).

<sup>378</sup> DoD REPORT, *supra* note 103, at 4-5.

<sup>379</sup> *Id.*; Other Agency Report, *supra* note 326, at 10.

<sup>380</sup> Other Agency Report, *supra* note 326, at 10.

<sup>381</sup> *Id.*

<sup>382</sup> DoD REPORT, *supra* note 103, at 7.

In addition to increased training, DoD recommended the establishment of a centralized federal office for child support enforcement.<sup>383</sup> The envisioned office would provide a centralized point of contact within the federal government for state child support enforcement offices that need assistance in handling cases involving overseas non-custodial parents.<sup>384</sup> The office would also have responsibility for coordinating service of process with appropriate federal agencies.<sup>385</sup> The report claimed that the advantages of a consolidated, centralized, and staffed office with persons trained to handle service of process overseas would outweigh the funding requirements to establish a centralized office.<sup>386</sup>

b. *Analysis*--The recommendation for increased education of U.S. practitioners is appropriate.<sup>387</sup> However, the expenditure of funds to train foreign governments and practitioners is questionable in light of other methods available to improve service of process.<sup>388</sup>

The DoD recommendation for a centralized office is premature in light of the designation of responsible officials

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> Presumptively, had they been better, then neither DoD nor OPM and HHS would have found lack of knowledge a problem.

<sup>388</sup> For example, such other methods include the use of consular channels, agreements with other countries, direct federal agency assistance with service of process, etc.



within each agency for facilitating assistance with service of process.<sup>389</sup> These agency points of contact, depending on the commitment of each federal agency, will likely become valuable resources for guidance to those unfamiliar with the assistance provided by each agency. Further, as noted below, there are other agencies within the federal government that could simply take on an increased leadership role in this area.

c. *Alternative(s)*--Enhance the role of the Department of State in service of process for child support enforcement matters, particularly for overseas issues. The Department of State already has an office that provides general guidance on service of process overseas.<sup>390</sup> "The [State Department] officials in Washington are invariably helpful, knowledgeable and dedicated despite overwhelming workloads and responsibilities."<sup>391</sup> It would be a worthwhile investment to increase their funding and staff to take a lead role in such matters.

Additionally, an increase in staff accords with the proposal to change Department of State policy regarding use of consular channels to serve process abroad.<sup>392</sup> While the Department of State is already involved in the submission of letters rogatory, this approach would permit them to take on a

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<sup>389</sup> Exec. Order No. 12,953, *supra* note 8, at § 302.

<sup>390</sup> Department of State, Office of Citizen and Consular Affairs, (202)647-9577.

<sup>391</sup> DeHart, *supra* note 307, at 103.

<sup>392</sup> See part VI.B.1.b.

greater role with service of process in countries that are signatories to the Hague Service Convention. Centralization of this function within the Department of State would forego creating another separate centralized office, as DoD suggests, that would overlap with the Department of State because they would not have authority to engage in the letters rogatory process. Finally, this proposal would dramatically reduce the need to educate state and foreign practitioners. Basically, all that state practitioners would have to know is that they need to refer a matter involving overseas service of process to the State Department.

4. *Different Agency Policies*--The other agency report identified an issue with differences in federal agency policies.<sup>393</sup> Some agencies are stricter in their policies regarding personnel who fail to provide required support.<sup>394</sup> For instance, the Department of State policy affirmatively requires employees to accept service of process for child support enforcement actions or face curtailment or adverse disciplinary action.<sup>395</sup>

a. *Recommendation*--The Report recommends that all federal agencies with workforce employees or members outside the United States clarify their personnel policies.<sup>396</sup> Also,

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<sup>393</sup> Other Agency Report, *supra* note 326, at 10.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.*

<sup>396</sup> *Id.* at 11.

agencies must inform employees of their duty to comply with child support obligations and potential sanctions.<sup>397</sup>

b. *Analysis*--This is one of the most important steps that federal agencies can take to improve assistance with service of process procedures. The Department of State took the lead amongst federal agencies by quickly establishing an aggressive policy that orders employees to arrange for an acceptable method of service of process in child support and paternity actions. If their employees do not make such arrangements, then the Department of State may take appropriate adverse action against them.<sup>398</sup> Other agencies, including DoD, have not yet adopted this approach. While there may be some legal issues with the Department of State

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<sup>397</sup> *Id.*

<sup>398</sup> United States Department of State, Department Notice: *Facilitating Payment of Child Support* (May 15, 1995) [hereinafter DOS Notice].

The Department must make its employees stationed abroad available for service of process in State court civil cases concerning paternity and child support. That means employees may not use their diplomatic or consular status to avoid acceptance of service in such court actions. The Department will not accept papers or service of process on the employee's behalf, but it will require the employee to arrange an acceptable method for acceptance of service. The Department will waive diplomatic immunity if necessary. An employee who refuses to accept service in violation of this order may be subject to immediate curtailment of tour and to disciplinary action, as appropriate.

*Id.*

approach,<sup>399</sup> it clearly accords with the spirit and intent of the President's Executive Order.<sup>400</sup>

Within the Armed Forces, establishment of this type of policy would greatly facilitate service of process. However, the Posse Comitatus Act may prohibit using the military to serve process, or using military authority to order members to accept process.<sup>401</sup> To avoid this legal prohibition, the Posse Comitatus Act should be amended to authorize the use of military authority.<sup>402</sup> If amended, commanders could give lawful orders, carrying the threat of criminal prosecution,<sup>403</sup> to service members who refuse to make themselves available for service of process. The days when commanders fruitlessly asked service members to voluntarily accept service of process, after seeing a legal assistance attorney, would disappear, and legal gamesmanship would give way to the practical needs of society.<sup>404</sup> Note, the establishment of

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<sup>399</sup> If there is a collective bargaining agreement in place, an agency may have to negotiate this as a term and condition of employment with the union. 5 U.S.C. §§ 7103, 7114 (1994).

<sup>400</sup> Exec. Order No. 12,953, *supra* note 8, at § 101.

<sup>401</sup> See generally 18 U.S.C. 1385 (1994); *Lamont v. Haig*, 539 F. Supp 552, 555 (D.C.S.D. 1982); Air Force Opinion, *supra* note 108.

<sup>402</sup> See *infra* parts II.C. and VI.B.1.c.

<sup>403</sup> UCMJ art. 92 (1995 ed.) (failure to obey an order or a regulation).

<sup>404</sup> See e.g., DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM (30 Sept. 1992). Military policies authorize legal assistance for military members. After receiving legal advice on the effect of accepting process, a member would often choose to decline it, thereby delaying or avoiding the pending court action. Without a court order establishing paternity or awarding support, commanders have no authority to force members to provide financial support or to take adverse action against them. *Id.*

responsible officials under the Executive Order will help monitor compliance with this type of approach.<sup>405</sup>

5. *Different Service Policies*--Similar to the problem of differing agency policies, the DoD Report identified that the individual military services have varying policies on providing assistance with service of process.<sup>406</sup> For instance, the Report highlights the flexible Air Force policy that allows process servers on all Air Force installations, regardless of whether they are in areas of exclusive federal jurisdiction.<sup>407</sup> Furthermore, the Air Force policy provides assistance overseas regardless of whether the host nation is a signatory to the Hague Service Convention or its internal laws would otherwise prohibit service of process in violation of the host nation's sovereignty.<sup>408</sup>

a. *Recommendation*--DoD recommended that the Services establish uniform rules on the service of process for child support enforcement matters.<sup>409</sup> These rules would allow process servers on all installations regardless of whether they were exclusive jurisdiction or not.<sup>410</sup> The rules would

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<sup>405</sup> Exec. Order No. 12,953, *supra* note 8, § 302 (Responsible officials provide a check on the system when commanders or other military authorities don't provide assistance either due to ignorance or lack of adherence to policies).

<sup>406</sup> DoD REPORT, *supra* note 103, at 6.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

also ensure the availability of service members for service of process within a reasonable amount of time (making provision for exceptions such as when the member is in a combat zone) based on uniform DoD guidance.<sup>411</sup>

b. *Analysis*--DoD is on point with its analysis. Uniform DoD rules on service of process would avoid variances in service policies. The public often negatively views such variances, not understanding why one service permits service of process and the other does not. However, DoD should cautiously approach adopting uniform guidance that would permit service overseas in violation of host country law or the Hague Service Convention. While the Air Force may have avoided problems due to a lack of interest or knowledge of such practices by foreign nation authorities, it would be better to have official understandings and agreements entered into that permit DoD to serve its own members overseas.

c. *Alternative(s)*--DoD should include in its uniform guidance rules requiring members to arrange for acceptance of service of process similar to those mandated by the Department of State for its employees. Also, DoD should not wait for a response from OMB to begin drafting and implementing guidance. If model employer status is the goal, then DoD must aggressively take the lead to make improvements on its own. This includes soliciting the Department of State

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<sup>411</sup> *Id.*

to work out understandings and agreements with foreign nations.

6. *Responsible Official*--The other agency report identified an issue with the appointment of responsible officials under the Executive Order<sup>412</sup> for facilitating service of process on agency employees or members.<sup>413</sup> The report commented that such designation does not guarantee actual service of process.<sup>414</sup> The report further stated that the issue of service of process overseas may not be that big a problem,<sup>415</sup> noting that "a few highly publicized problems in overseas service of process cases may have made it appear that there are more problems than there really are."<sup>416</sup>

a. *Recommendation*--The other agency report recommended that the OCSE form a working group of federal agency responsible officials. This group would determine the scope of the problem (for example, how many cases are problems due to lack of information) and recommend appropriate remedies.<sup>417</sup>

b. *Analysis*--OPM and HHS are correct that the appointment of responsible officials does not guarantee

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<sup>412</sup> Exec. Order No. 12,953, *supra* note 8, § 302.

<sup>413</sup> Other Agency Report, *supra* note 326, at 9.

<sup>414</sup> *Id.*

<sup>415</sup> *Id.*

<sup>416</sup> *Id.*

<sup>417</sup> *Id.*

service of process. Even with responsible officials appointed, federal agencies have no greater authority to ensure actual service of process. The appointment also fails to overcome the expense, delay, and complexity associated with service overseas.

Their recommendation to form a working group of responsible officials is meritorious. However, it is questionable why OPM and HHS did not form a working group of responsible officials prior to submitting their 180-Day Report to OMB. Their charter in the Executive Order gave them the authority to convene that type of working group.<sup>418</sup>

c. *Alternative(s)*--The Executive Order did not provide guidance on the duties of responsible officials other than to state that they should facilitate a member's availability, regardless of location.<sup>419</sup> OPM should immediately promulgate uniform guidance on what "facilitation" means. Otherwise, some agencies may take a minimalist approach as compared to the aggressive stance taken by the Department of State in requiring their employees to arrange for acceptance of service of process.<sup>420</sup>

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<sup>418</sup> Exec. Order No. 12,953, *supra* note 8, § 402 ("Other agencies shall be included in the development of recommendations . . ."). Also, § 302 of the Executive Order required publication of the list of responsible officials in the Federal Register by July 1, 1995. Accordingly, OMB had time to meet with them.

<sup>419</sup> Exec. Order No. 12,953, *supra* note 8, at § 302.

<sup>420</sup> See DOS Notice, *supra* note 397 (on Department of State policy making employees responsible for arranging for acceptance of service of process).



7. *Translation*--The other agency report identified the requirement to translate documents when sent to a Central Authority under the Hague Service Convention as a problem.<sup>421</sup> Translation is costly and time consuming.<sup>422</sup>

a. *Recommendation*--The Report recommended that OCSE, in conjunction with state child support practitioners, explore simplified, low-cost methods to facilitate translations.<sup>423</sup>

b. *Analysis*--While this recommendation makes sense, it is not a new thought and has been the subject of international concern for many years.<sup>424</sup> Also, the translation problem is only relevant when dealing with foreign defendants who do not understand the English language,<sup>425</sup> or when serving process using the Central Authority method under the Hague Service Convention.<sup>426</sup> Adoption of federal agency policies requiring employees and members to arrange for service would negate this concern regarding American defendants who do not need the documents translated into another language.<sup>427</sup> The

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<sup>421</sup> See Hague Service Convention, *supra* note 23, at art. 5.

<sup>422</sup> Other Agency Report, *supra* note 326, at 10.

<sup>423</sup> *Id.*

<sup>424</sup> See generally *First Special Commission Report*, *supra* note 299, at 323.

<sup>425</sup> See generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

<sup>426</sup> Hague Service Convention, *supra* note 23, art. 5.

<sup>427</sup> Translation is only required when using the Central Authority. See *id.*

same rationale applies if service is made through consular channels.

## VII. Part Six: Unified Approach

The DoD Report and the other agency report contain fragmented recommendations that do not operate together as part of a total solution. Also, as depicted by the above alternatives, the recommendations found in both the DoD Report and the other agency report are not the only solutions for improving service of process. The following synthesizes the recommendations and alternatives found in Part Five above and recommends a unified approach for improving service of process that DoD, in conjunction with other federal agencies, should implement to enhance child support enforcement.

### A. *DoD Specific Steps*

1. *Promulgating Uniform DoD Guidance*--DoD must promulgate the following minimum guidance for service of process.<sup>428</sup>

#### a. *Member Responsibility*

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<sup>428</sup> Although these do not relate to improving service of process, DoD should also consider requiring the military services to develop uniform guidance on support amounts in the absence of a court order or mutually acceptable agreement, as well as requiring uniform criminal sanctions similar to those promulgated by the Army under AR 608-99, *supra* note 95, at para. 2-5.

Military members have an absolute legal and moral responsibility to provide for the financial and medical support of their children, whether legitimate or born out of wedlock. In accordance with their responsibility, members shall arrange for receipt of service of process in child support actions pending against them. When a military member knows that papers to be served on him or her, whether by personal service, mail, or other method prescribed by an international agreement, contain notice of a child support enforcement action, the member shall accept the service of process. After accepting the process, the member will have the opportunity to seek advice of a military attorney, or private attorney at no expense to the government, regarding the process. In the absence of military exigency, military commanders shall authorize military members reasonable time, including leave, and legal assistance necessary to respond to the action.

*b. Military Department Responsibility*

The Military Departments are responsible for ensuring, through command channels, that military members meet their child support responsibilities. This includes requiring members to provide for children pursuant to a court order, a mutually acceptable support agreement, or an interim support regulation. Also, military members shall provide support to children born out of wedlock as directed by a court order, or if the military member has acknowledged paternity on a paternity acknowledgment form developed by federal, state, or local authorities pursuant to a hospital-based paternity establishment program. Additionally, the military services shall ensure through command channels that child support enforcement agencies and process servers in child support enforcement actions receive prompt assistance with service of process. Military commanders shall permit process servers, regardless

of the forum state, to serve process for a child support enforcement action at reasonable times and locations on installations or facilities under their control.

2. *Advocating Legislative Changes*--DoD should advocate the following legislative changes.

a. *Amendment to Posse Comitatus Act*--Congress should amend the Posse Comitatus Act as follows:

§1385a--Service of Process by Military Authorities: The Secretary of Defense may promulgate rules permitting military authorities to deliver State court process for establishing paternity or a child support order to military members as an exception to the Posse Comitatus Act. The act by military authorities of accepting and delivering process shall not subject military authorities or other Federal government officials to the jurisdiction of State courts nor make Military Authorities, other Federal government officials, or the Federal Government liable for any cause of action.

b. *Postal Rules*--DoD should consult with OPM, HHS, and Postal Authorities to draft legislation that amends postal regulations to provide for external marking of mail (certified, registered, and other types of guaranteed mail) as "Child Support Enforcement Matter." The proposal must require that users of this marking certify, under penalty of criminal prosecution, that the enclosed material solely relates to a child support enforcement matter.<sup>429</sup> Postal delivery systems

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<sup>429</sup> See *supra* Part VI.B.2.

using this marking must be designed to ensure delivery to the recipient and return acknowledgment to the sender.

*B. Other Agency Actions*

1. *Uniform Guidance*--OMB needs to direct OPM, in consultation with other federal agencies, including DoD and HHS, to publish uniform guidance on the duties of responsible officials and federal agency policies regarding an employee's responsibility to provide financial support. The policy should entail the Department of State approach that authorizes adverse action against employees who fail to arrange for acceptance of service of process.

2. *Increased Use of Consular Channels to Serve Process*--The Department of State needs to amend its internal policies to take advantage of the permissible limits of its authority to serve process through consular channels under the Hague Service Convention.

3. *Coordination of Agreements or Understandings*--The Department of State must coordinate agreements and understandings with foreign nations, especially those that are signatories to the Hague Convention, to ensure the United States is authorized to serve process on its own nationals by methods that do not involve the foreign nation's resources or citizens. For example, permitting military authorities to

deliver process on military members when stationed in the foreign country; also, allowing the use of certified mail through military postal systems.

4. *Centralization of Service of Process*--OMB, in consultation with the Department of State and HHS, should seek increased funding for the Department of State to expand its staff in order to establish a centralized office for service of process in child support enforcement actions overseas.

#### VIII. Conclusion

The public's perception that service of process is a problem within the Armed Forces overshadows the relative success experienced by the Armed Forces in enforcing child support orders. Unfortunately, the underlying nature of military service creates occasions where notice and service on a member are nearly impossible. In the absence of these circumstances, the barriers to timely service of process on United States employees or military members overseas are a creation of federal government bureaucracy. It is time to cut the red tape and implement measures throughout the federal government that comply with the President's goal of creating an effective system of child support enforcement.

The agency reports submitted to OMB fail to propose adequate solutions for cutting through the quagmire of self-

imposed government obstacles. The recommended unified approach provides an opportunity for DoD to challenge the bureaucracy by implementing and promoting measures that improve service of process. While the unified approach may place military members in the forefront of child support enforcement matters, it is appropriate in light of previously existing military service policies requiring parents to meet their support obligations and the overriding responsibility that parents have to support their children.

The unified approach is not resource intensive. The military services already have systems in place to handle actual delivery of service of process in child support enforcement matters. Furthermore, by increasing Department of State involvement and resources to create one central location that can provide complete assistance to the States, including the service of process, state child support enforcement agencies would save costs and improve collections. Their cost savings, combined with increased collections in child support that reduce expenditures in federal programs, would likely compensate any expenditures required to increase the staff and resources of the Department of State.

In sum, DoD must be proactive and move quickly to remove barriers to service of process. This will facilitate judicial determinations of paternity and child support obligations that, once established, DoD can enforce better than other

employers nationwide. By promoting the unified approach, DoD will assume a responsible position of leadership amongst other federal agencies in child support enforcement and attain model employer status.